

Volume 7

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

IN RE TESLA, INC. SECURITIES
LITIGATION.

)
No. 18-cv-04865-EMC
)

San Francisco, California
Friday, January 27, 2023

TRANSCRIPT OF TRIAL PROCEEDINGS

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(Appearances continued, next page)

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PROCEEDINGS1 Friday, January 27, 2023

8:20 a.m.

P R O C E E D I N G S

3 (The following proceedings were held outside of the
4 presence of the Jury)

5 **THE COURTROOM DEPUTY:** All rise. Court is now in
6 session, the Honorable Edward M. Chen is presiding.

7 **THE COURT:** Have a seat, everyone. Good morning.

8 **MR. PORRITT:** Good morning, Your Honor.

9 **MS. TRIPODI:** Good morning, Your Honor.

10 **THE COURTROOM DEPUTY:** Court is calling the case In
11 Regarding Tesla Securities Litigation, Case No. 18-4865.
12 Counsel, please state your appearances for the record,
13 beginning with plaintiff.

14 **MR. PORRITT:** Good morning, Your Honor. Nicholas
15 Porritt of Levi & Korsinsky on behalf of the plaintiff and the
16 class.

17 **THE COURT:** All right, good morning, Mr. Porritt.

18 **MR. PORRITT:** Good morning.

19 **MR. SPIRO:** Good morning, Your Honor. Alex Spiro,
20 Quinn Emanuel, on behalf of the defendants.

21 **THE COURT:** All right. Good morning, Mr. Spiro.

22 So we have a few things we need to address. Well, first
23 of all, we're still -- you know, there are major problems with
24 transportation this morning, with BART being down. So we have
25 got our fingers crossed. There are three jurors from East Bay

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1 who are normally here early, but -- they haven't emailed us,
2 but hopefully they'll get here. So there may or may not be a
3 delay. But anyway, that's what's going on on that front.

4 Two, I think we should address the question of Mr. Arnold
5 and the emergency motion. Seems to me that I have a rule that
6 you have to identify witnesses two days in advance, and that
7 wasn't done. So the idea of compelling him to come here today,
8 that's a tough sell.

9 **MR. APTON:** Well, Your Honor, we identified him and we
10 disclosed him and we worked with defendants to coordinate.
11 They wanted to get Mr. Gracias in; we accommodated their
12 request. We pushed video depositions to the back of the line.
13 And then we have additional time, which we are appreciative of.

14 **THE COURT:** And that additional time was known to the
15 parties, I even raised it in front of the parties with the jury
16 Monday afternoon, said: Please check.

17 Came back Tuesday, said yes. So you knew as of Tuesday
18 you had the extra time.

19 **MR. APTON:** Was it not Thursday that we found out? Or
20 Wednesday, Your Honor? I don't quite recall which day, but
21 nonetheless, once we found out we had additional time we then
22 responded to their motion, defendants' motions to strike or
23 exclude Mr. Arnold and we said: No, no, no, we don't want to
24 exclude him, we want to call him, and we're going to call him
25 on Friday.

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1 **THE COURT:** So what's the problem with calling him on
2 Tuesday?

3 **MR. APTON:** It is just pushing witnesses off of
4 order. If Your Honor is of that mind, then we will call him on
5 Tuesday. But we think he is important; he should be here.
6 He's under subpoena. I don't understand why defendants let him
7 go from the subpoena, especially --

8 **THE COURT:** He is still, in my view, subject to the
9 subpoenas of this Court. But the question is, can you call him
10 on such short notice? And the answer is no.

11 So I'm going to allow you to call him and summon him for
12 Tuesday because that complies with my two-day rule.

13 **MR. APTON:** Okay.

14 **THE COURT:** But I never released him. It takes a
15 court order to release somebody from a subpoena. As far as I'm
16 concerned, I excused him. That's why I said "Witness is
17 excused."

18 **MR. APTON:** I appreciate that, Your Honor.

19 **MR. SPIRO:** So we understand the Court's ruling as to
20 today. Just to be very clear, he was a junior person in the PR
21 department of Tesla, hasn't worked there in approximately half
22 a decade. We don't have him under lock and key. If they want
23 to subpoena him, they can subpoena him.

24 I'm at a loss -- he was originally scheduled to testify on
25 the 20th. He took a day off of work, then another, then

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1 another. They then supplemented their witness list and told us
2 they weren't calling him and gave us a list until the end of
3 trial. Forget just the Court's rules. This, this young person
4 has now been out of work and has been told as a third-party
5 witness that he wasn't going to be testifying. We didn't do
6 that unilaterally, we did that on their representation. They
7 also, as the Court knows, we filed a motion saying this is
8 cumulative, it's only for a rank hearsay purpose, if any
9 purpose. They didn't even respond to that.

10 The reason they didn't respond to that, Your Honor, when
11 they are responding to every other motion and every other thing
12 in realtime is because exactly what it shows, which is that
13 they weren't going to call him. They told us they weren't
14 going to call him.

15 So I don't understand this sort of belated -- we're
16 already way over on what their case was supposed to be. What's
17 going to happen here, Your Honor, is the defendants are going
18 to be prejudiced by the delay.

19 And again, I appreciate and I see very much how hard the
20 Court and everybody, frankly, that works alongside the Court
21 has been working, and I genuinely mean that. But what ends up
22 happening in these situations, because I've done this a few
23 times, is because the plaintiffs are going so far over and
24 putting in cumulative evidence -- again, evidence that we think
25 is rank hearsay -- what ends up happening because the Court is

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1 mindful of the jury's time is the defendants end up being
2 squeezed. And the defendants have rights, and defendants --

3 **THE COURT:** Well, rights are determined by the hours I
4 allocated, which are equal between the parties. I don't know
5 exactly what the number of hours left is, but it is dwindling
6 for the plaintiffs.

7 And, you know, the plaintiffs, if they are going to spend
8 an excessive amount of time in their case-in-chief, that cuts
9 down on their ability to conduct cross-examination in your
10 case, cuts down on their ability to have any kind of extended
11 closing. That's why I gave a budget. And so it works in a
12 self-policing way.

13 **MR. SPIRO:** And I understand that. And in many cases
14 and in some courts I understand that concept, and I understand
15 it here. This does have some unique contours, though,
16 Your Honor. Here we have many defendants, right, who could
17 very easily be represented by many different lawyers. They
18 just happened to be -- and they all have a right to testify,
19 they all have a right to put for their defense. And here we
20 have a very unique fact pattern that the Ninth Circuit has
21 addressed, where they actually have a burden of good faith.

22 And so what ends up happening is all of the sudden, people
23 who we don't believe -- and I think the evidence is going to
24 suggest -- have no business being in this case in the first
25 place, who have billions of dollars and reputational liability

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1 on the line, are going to be squeezed into next, next, next,
2 next, five-minute increments, is the way this is heading. And
3 I just think that is very unfair.

4 And what we are talking about on the other side -- and
5 that's -- you know, what in my judgment, of course, we should
6 be most concerned about, a defendant whose reputation and has
7 great risks and due process on the line versus what we're
8 talking about here, which is a belated disclosure, somebody
9 they clearly skipped over and told us they would skip over,
10 somebody who's clearly cumulative, who is being called for an
11 improper purpose.

12 And we don't think the Court should allow this.

13 **THE COURT:** All right. I will -- I will allow a short
14 discussion on the merits of what he is going to talk about and
15 the exhibits, but I'm not going to exclude somebody just
16 because, you know, the defendant doesn't think that the
17 plaintiffs are using their time effectively or using it in it a
18 way -- you have time, you have an equal amount of time to
19 respond.

20 I can't tell them: Don't call more than X number of
21 witnesses, don't have witnesses come on for three minutes or
22 four minutes. That is their prerogative.

23 So I'm more interested in what is Mr. Arnold going to say
24 and what's he here to testify to.

25 **MR. APTON:** Thank you, Your Honor. First, he is under

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1 a subpoena, because we did serve a subpoena, the defense
2 counsel accepted the subpoena. So I want to correct that for
3 the record.

4 **THE COURT:** Let me make it clear. There was no
5 withdrawal, and this Court did not quash or -- or withdraw the
6 subpoena. So the subpoena's outstanding. So that's -- that's
7 still a subpoena.

8 And the argument that they waived it by saying: All
9 right, we're not going to call him for X days, you know, that
10 was for, like, a two-day period. I'm not going to find a
11 waiver. The subpoena stays in effect, period.

12 So let's get to the next issue. What are you calling him
13 for?

14 **MR. APTON:** Your Honor, he has testimony showing that
15 Tesla's corporate machinery was responding on behalf of Musk to
16 this tweet. They, defendants, are making this argument that
17 Musk is a bidder and the company is separate and this is the
18 reason to cut off the imputation of scienter, which is now a
19 main focus point of this trial.

20 So, so long as we can show that there was no -- that Musk
21 was acting within his scope of authority as CEO using Tesla's
22 corporate machinery to respond to this tweet, that allows --

23 **THE COURT:** That testimony you are trying to get in is
24 to show that through Arnold, Mr. Arnold, Tesla resources were
25 being used on Mr. Musk's behalf, even as a putative bidder as a

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1 counterparty was being used to communicate with the Street?

2 **MR. APTON:** Yeah, it directly contradicts this notion
3 that there was some delineation between Musk as bidder and the
4 company as I guess a seller, so to speak? But that is just
5 Point One.

6 Point Two is that Dave Arnold has a lot to say about the
7 importance of "Funding secured" relative to the market as a
8 whole. You have heard testimony on that. But that is a very
9 important issue in this case.

10 **THE COURT:** What is he going to say in that regard?

11 **MR. APTON:** He is going to say the media was focused
12 on what's the funding, where's the funding coming from, is
13 funding secured, not this --

14 **THE COURT:** No question as to materiality.

15 **MR. APTON:** Yeah.

16 **MR. SPIRO:** May I respond briefly, Your Honor?

17 **THE COURT:** Yeah.

18 **MR. SPIRO:** As to the first point, Mr. Musk and
19 Mr. Ahuja already testified regarding the blog post. That is
20 why this witness is cumulative. We're not going to say and I'm
21 not going to argue that the blog post and some of the PR wasn't
22 done by Tesla. I've personally elicited testimony as to that
23 effect. So that issue is not in dispute. And because that
24 issue is not in dispute this is not a contested fact, nor is it
25 anything other than cumulative testimony. So that's first.

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1 Second, the other reason, purported reason for calling
2 this man is rank hearsay, yet again. And all they're going to
3 testify is to what other people are saying. That's, again, I
4 still don't understand it. And I don't -- now we are talking
5 about a PR person. At one point we were talking about an IR
6 person, and I understood the Court's preliminary rulings to be
7 that IR people and the people in the marketplace. Now we're
8 talking about a man that is interacting with reporters.

9 It's -- it's like three levels of hearsay, it's completely
10 irrelevant, it's prejudicial. And we would be objecting to any
11 testimony regarding that, anyway.

12 **THE COURT:** Let me clarify something. Is his
13 testimony what he heard from reporters? Or what he heard from
14 investors and analysts?

15 **MR. APTON:** What he was communicating to reporters,
16 what he's hearing from reporters in response to the company's
17 public statements.

18 Counsel is saying that all these facts are stipulated to,
19 they're not in dispute, they're not contested. But what
20 they're not saying is they're not saying: Okay we agree that
21 Musk was acting in his role as CEO. If they want to stipulate
22 to that, then perhaps we don't need Mr. Arnold. But I don't
23 hear them saying that.

24 **THE COURT:** All right. Address the second point.
25 If -- and if the exhibits were to bear this out, he's conveying

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1 lists of media reports, which in turn are based on, I take it,
2 interviews with analysts or investors or experts, this sort of
3 thing.

4 Why isn't that now -- it's one thing if a group of
5 investors went to the witness and said: What the heck's going
6 on? We had some of that.

7 **MR. APTON:** Uh-huh.

8 **THE COURT:** There were inquiries to -- I think it was
9 Mr. Ahuja or whoever it was.

10 **MR. APTON:** Yeah.

11 **THE COURT:** What is this "Funding secured"? And all
12 this sort of stuff.

13 **MR. APTON:** Mr. Viecha, yeah.

14 **THE COURT:** That came in. But to say: Well, here is
15 a list of newspaper articles, that adds an extra layer of
16 hearsay, seems to me.

17 I mean, if you want to introduce the articles, themselves,
18 through -- if you have an appropriate means to do that and show
19 that those were disseminated to the public and that is part of
20 the milieu that was out there, I suppose, but I'm not sure I
21 understand Mr. Arnold's role.

22 **MR. APTON:** Your Honor, what Mr. Arnold does is he is
23 saying internally: Hey, they want to know where the funding's
24 coming from; can we give them more information on this? So it
25 shows that internally Tesla knew this information was material,

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1 yet they did not disclose anything.

2 This is an important piece of our case for the jury to
3 hear. It underscores the materiality, the importance of the
4 information, the "Funding secured" information, and it shows
5 that Tesla, notwithstanding the --

6 **THE COURT:** So now you're talking about Tesla's state
7 of mind, in terms of knowing about potential materiality of
8 that particular phrase.

9 **MR. APTON:** Yes, Your Honor.

10 **THE COURT:** And that is relevant -- this is during the
11 class period?

12 **MR. APTON:** Yes, Your Honor.

13 **THE COURT:** And so that is relevant to what?

14 **MR. APTON:** It shows that everyone, everyone involved
15 in this case -- the public, the reporters, even Tesla
16 internally -- knew this was very important information, that
17 there needed to be a -- a direct piece of news to come out to
18 cure this informational deficiency in the market.

19 **THE COURT:** So this goes then to the Section 20
20 liability of a director, so they didn't take action in the face
21 of this, and didn't exercise their supervisory authority?
22 Because Musk's intent is -- at this the point, is kind of water
23 under the bridge.

24 **MR. APTON:** Well, so, Your Honor, that leads to the
25 next issue before the Court. It's not under the bridge because

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1 defense counsel is claiming that he acted in good faith. So we
2 need to counteract that notion, this narrative that's being
3 broadcast to the jury.

4 And so to the extent we can show that Musk knew
5 information was necessary, that Ahuja, that Tesla's top
6 executives knew information was lacking, that their disclosures
7 to date have been deficient, that underscores --

8 **THE COURT:** So what you're now saying is his inaction
9 in the face of this known or possibly perceived materiality and
10 questions raised in the market was not adequate, and that
11 demonstrates bad faith? Knowledge on his part?

12 **MR. APTON:** It pushes back against this evidence or
13 testimony of non-culpable intent, which shouldn't be an
14 issue -- I agree with Your Honor, it should not be an issue,
15 but it has become such.

16 **THE COURT:** All right. Give you a brief chance to
17 respond.

18 **MR. SPIRO:** I didn't really hear an answer to any of
19 the Court's questions. Mr. Apton was sort of trying to come up
20 with an admissible purpose on the fly. So I'm kind of shifting
21 between --

22 **MR. APTON:** Can I just object, Your Honor? This is
23 not proper.

24 **THE COURT:** I'd like you just to respond to the
25 argument that this evidence is probative to both the state of

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1 mind of Tesla as well as to Mr. Musk because it goes to their
2 awareness of urgent materiality that was being discussed in the
3 market and the need for information.

4 **MR. SPIRO:** So, so, these emails don't even go to
5 Mr. Musk. The emails that he's talking about. They're
6 literally, as the Court was questioning, emails from Mr. Arnold
7 -- again, it's reporters,, as the Court just pointed out. It's
8 their -- they're not a slice of the market, they're not
9 investors, they're not shareholders. It's --

10 **THE COURT:** It is going to others within the company.
11 Something like executives or something?

12 **MR. SPIRO:** Okay. So we'll move aside, because it
13 doesn't go to Mr. Musk. To Tesla, if that's where the Court
14 wants to focus. But again, Tesla's state of mind is not an
15 issue. Doesn't go to the board. So that, to me, ends that
16 analysis.

17 **THE COURT:** Are you saying that there's an inference
18 that this information either went to Tesla -- I mean, Tesla's
19 board, who, that's whose scienter would be at stake, or and/or
20 Mr. Musk?

21 **MR. APTON:** Well, so, Your Honor, because the jury
22 instructions are as they are now, there's no instruction on
23 corporate scienter. It's just imputation of scienter from Musk
24 to Tesla.

25 The issue that we're facing here is defendants are

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1 eliciting testimony suggesting that Musk did not act with a
2 culpable state of mind. And so to the extent that we can have
3 evidence that pushes back against that narrative, we need to do
4 it. And this is --

5 **THE COURT:** And their response is there's no evidence
6 from the exhibits; Musk is not copied on this.

7 **MR. APTON:** I -- I understand that, Your Honor. But
8 nonetheless, it does give facts from which the jury can infer,
9 or discredit this good faith intent on the part of Mr. Musk.

10 **THE COURT:** So it requires an inference that he likely
11 got word of this.

12 **MR. APTON:** For Mr. Musk, directly? Yeah. Yeah. And
13 it would support that, too. If all of his executives are
14 receiving this? I mean, Mr. Arnold is not some low-level line
15 worker. He's the second person on this two-man IR team,
16 according to Mr. Viecha. He's talking directly to Deepak
17 Ahuja, to Sarah O'Brien. All these folks, all these folks that
18 were in direct contact with Mr. Musk on this particular issue.
19 The ones that wrote the blog post for Mr. Musk.

20 And Your Honor, you know, defendants have been on notice
21 of our intent to call Mr. Arnold for months. They could have
22 filed a motion in limine, like we did with Sam Teller. They
23 did not. Only now, because they have six hours left, you know,
24 time is --

25 **THE COURT:** Well in any event, I'm not going to

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1 exclude his testimony. If there are parts of it that you can
2 raise an objection during the course of his testimony, you can
3 do so. But my view is that he's high up enough in the chain.
4 The emails went to people high up enough in the chain.

5 I think it also went to general counsel, is that correct?

6 Mr. Maron?

7 **MR. APTON:** Yes, that's correct.

8 **THE COURT:** And it went to everyone around him. So
9 one could draw an inference -- the jury could draw an inference
10 that this was such a high-level discussion that they could find
11 that Mr. Musk -- it got Mr. Musk, even though there's not a
12 document that says that. They could find that it went to some
13 or all of the board members, even though there is not a direct
14 document, as I understand, that says that.

15 So it's -- it's at a high enough level that a corporate,
16 corporate or individual awareness is inferable. So it does go
17 to state of mind.

18 **MR. PORRITT:** Thank you, Your Honor. What would
19 Your Honor like to take up next?

20 **THE COURT:** Well, there's this motion for a cautionary
21 instruction. I understand your point, but I already gave a
22 mid-trial instruction that: You may hear testimony, et cetera,
23 et cetera, that I've already found that the tweets were untrue,
24 but it could go to other issues such as knowledge, et cetera,
25 et cetera.

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1 I don't see a need to do that again, because you're going
2 to get that instruction in the end.

3 **MR. APTON:** Your Honor, if I may, what are we meant to
4 do? Because the cautionary instruction Your Honor previously
5 gave talked about falsity. And here, we've been hearing a lot
6 of testimony about state of mind. Recklessness was found. The
7 only issues for the jury to decide should be --

8 **THE COURT:** Well, that's testimony that we heard from
9 various people: Yeah I thought it was true, that was an
10 absolute true statement, blah, blah, blah. That goes to their
11 state of mind.

12 **MR. APTON:** That goes to their state of mind, but that
13 includes Mr. Musk. And it also does include --

14 **THE COURT:** I already instructed twice now. At the
15 very beginning, and then I instructed again at your request,
16 midstream, after trial already started, which was an unusual --
17 it's not a typical course to do. But I did that, exactly
18 because I thought that there's going to be some evidence, and
19 he was going to actually deny substantively, and there was
20 going to be evidence about who actually said what, and what was
21 accurate.

22 And I reminded the jury that evidence can come in not to
23 determine the truthfulness or not of the statement, but it may
24 go to other issues such as state of mind, good faith,
25 et cetera, et cetera.

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1 **MR. APTON:** So Your Honor, I just want to point out
2 when you initially gave that cautionary instruction, you did it
3 because you were worried, I believe -- or counsel was worried,
4 I should say, that jurors would say: Oh, well maybe funding
5 was secured. And after the past two days of testimony between
6 Mr. Musk, Ahuja and Gracias, I'm pretty certain that some
7 jurors are questioning: Maybe funding was secured.

8 And that's a real problem, because we cannot -- Your Honor
9 has prevented us from saying "The Court has already found."
10 The Court is left with this instruction that they are to assume
11 falsity. Nothing about state of mind yet. And the more
12 evidence we get about Mr. Musk's good faith intentions, it
13 waters down that Court summary-judgment ruling on recklessness.

14 So the issue the jury should be deciding is: Was this
15 recklessness or knowledge, knowing violation of the law?
16 Strictly for the purposes of this joint and several liability,
17 allocation of responsibility issue.

18 There should be no testimony about whether or not Musk
19 acted with a good intent or good non-culpable explanation for
20 his conduct.

21 **THE COURT:** All right. Response?

22 **MR. SPIRO:** It's the same response that I gave last
23 time, which is all of this testimony is relevant; the witnesses
24 are allowed to testify truthfully to their state of mind. A
25 witness is not forced into the corner of testifying

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1 untruthfully as to their own beliefs just because of some
2 ruling.

3 And this -- Mr. Musk's testimony is now days and days ago.
4 You gave an instruction the day of his testimony. Courts are
5 loath to instruct juries mid-trial. Their instruction is going
6 to be coming before summations, and that's the way they should
7 proceed.

8 There also was no objection at the time, no request at the
9 time. All of that, if you look at it in context, is fair and
10 appropriate and truthful testimony from the witnesses.

11 **MR. APTON:** Your Honor, I can't object --

12 **THE COURT:** Well, that's one point. You could ask for
13 a limiting instruction at some point.

14 **MR. APTON:** Your Honor, we made a motion in limine on
15 this exact issue. Your Honor denied it. And I can't object
16 while a witness is on the stand because his testimony violates
17 the summary-judgment order. I mean, I could do that, but --

18 **THE COURT:** No. You can ask for a limiting
19 instruction, that this witness's testimony about the truth and
20 accuracy only goes to his understanding, his state of mind,
21 et cetera, et cetera.

22 **MR. APTON:** I assumed that that -- from the jury
23 instruction disputes that we have had, that were extensive, I
24 assumed that that was in place. What we're asking for now is a
25 limiting or cautionary instruction that whatever happened in

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1 the past few days is not taken as evidence of Mr. Musk's state
2 of mind, because it's already been decided.

3 **THE COURT:** All right. I'm not going to grant that
4 request at this juncture. I've already given an instruction,
5 given it twice. I'm going to give it again. And the final
6 instruction, because of the way things worked out, will also
7 have an express instruction about recklessness.

8 If I hear testimony over the next three or four days that
9 I think compels a one more time, midstream instruction, I
10 reserve the right to do that.

11 **MR. APTON:** So Your Honor, so we're clear on our side,
12 if we hear testimony that we think violates Your Honor's ruling
13 just now, how should we go about noting that objection?

14 **THE COURT:** Well, if somebody testifies, for instance:
15 Yes, that tweet was accurate, the "Funding secured" was
16 accurate in my view, you can ask for an instruction that that
17 goes to state of mind, only.

18 **MR. SPIRO:** Well, but I -- you're saying that if
19 somebody were to say: I'm looking at the words "Funding
20 secured" in isolation, and I'm testifying that I'm telling you
21 as some lay opinion that that is technically accurate... If we
22 listen to that testimony, I would agree with the Court.

23 If a witness says: I looked at all the information as a
24 whole, and I understood it to be consistent with the state of
25 affairs, I understood it to be accurate, I understood it to be

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1 truthful in my own mind, what are we talking about --

2 **THE COURT:** Well, if he says "in my own mind," yeah.

3 **MR. SPIRO:** But a witness doesn't -- I think we're,
4 most respectfully, sort of torturing the way witnesses testify.
5 Witnesses don't say "in my own mind." They're not testifying
6 as scientists or experts. The person saying --

7 **THE COURT:** Right. But if it's phrased in a way that:
8 "Musk was right, he did everything right, and he knew it, and
9 his" ... you know, he says something that goes to -- implies
10 more than "This was my opinion about whether this is correct,"
11 and begins to say something that opines on the ultimate fact,
12 for instance, or that as an absolute truth these matters were
13 truthful, all I'm saying is I'm going to listen to the
14 testimony.

15 If I think at some point it warrants an instruction -- and
16 I don't expect you to pop up every time. It's going to have to
17 be something pretty severe. Because I may deny it, you know.
18 I don't have to give a limiting instruction. I may deny the
19 limiting instruction. I'm going to have to hear it. Yeah.

20 **MR. SPIRO:** This testimony also obviously goes to
21 materiality. But I don't want to leave this in an unsettled
22 state of affairs.

23 From my perspective -- and I've said this to the Court for
24 now quite some time -- I'm very concerned with -- I'm more
25 concerned than I've been in any case I have ever handled, about

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1 the defendants getting a fair trial here. So I'm left in a
2 position, in a situation where I've never -- I've never had
3 this experience before, frankly.

4 If they want to stand up and make an objection, I would
5 ask that we do this at sidebar. Meaning I don't want this in
6 front of the jury, where they're standing up and saying
7 whatever they may say or may not say. If they have an issue
8 and they want to bring it up right after witnesses' testimony,
9 nothing is more dramatic and prejudicial, frankly, to a
10 defendant than a judge, immediately after a witness's
11 testimony, issuing an instruction to a jury.

12 So what I don't want is this to now be some blessing of a
13 standing-up speaking objection, saying: Yeah, Judge, can you
14 instruct everybody that the witness is telling a -- lying?

15 Mind you that we are on the plaintiff's case --

16 **THE COURT:** So the answer to that, because I'm not
17 going to allow a speaking instruction, it'll be obvious to me.
18 You'll ask for a limiting instruction. I'll either say
19 "Denied," or I may give a limiting instruction and say that
20 that testimony is taken for the purpose, as it goes to that
21 witness's understanding. And that witness's state of mind or
22 somebody else's.

23 **MR. SPIRO:** And if the Court is inclined to do
24 anything other than overrule it, I would be -- I'm making a
25 standing request to be heard at sidebar on this issue. So I

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1 don't want to --

2 **THE COURT:** I don't take standing requests for
3 sidebar.

4 **MR. SPIRO:** Okay, well --

5 **THE COURT:** If you have a specific one, you can do
6 that. You can always ask for a sidebar. I don't always grant
7 it. And, but I'm already saying that, number one, I don't
8 expect this to be launched every time somebody says something.

9 **MR. APTON:** No, Your Honor.

10 **THE COURT:** Number two, it's not going to be a
11 speaking objection. Otherwise, I'll shut that down. I'm not
12 going to take any objection.

13 And three, I'll rule as I think it's necessary, and I may
14 not think it's necessary. And if I do think it's necessary, it
15 will be a very succinct instruction.

16 **MR. APTON:** Your Honor, when Mr. Musk was on the stand
17 he testified, "I was 100 percent truthful." At that time, if
18 we're operating under these new rules, or these rules that
19 we're now discussing: Objection, limiting instruction. Is
20 that what Your Honor is suggesting?

21 **MR. SPIRO:** Well, again, he's allowed to say that when
22 he said it, he believed it to be true.

23 **MR. APTON:** No, he said "I was 100 percent truthful."

24 **THE COURT:** In that instance, I would have denied the
25 motion.

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1 **MR. APTON:** He says it's factually --

2 **THE COURT:** In that instance -- you're giving me now a
3 retrospective hypothetical -- I would deny the instruction
4 because it's obvious he is talking about his understanding.
5 And you can easily argue that and characterize that.

6 **MR. APTON:** Understood, Your Honor.

7 **THE COURT:** Okay?

8 **MR. APTON:** Okay.

9 **THE COURT:** All right. In terms of other evidentiary
10 objections, in case you need to know, I have overruled -- find
11 my notes here -- By the way, I've got a feeling the jury's not
12 here.

13 Okay. With respect to the two exhibits, I'm overruling
14 the objections with one exception. At Page 160, Lines 2
15 through 17, I think that is a hearsay that I -- I don't think
16 there's an exception that applies. Because this was after the
17 fact. This was -- this was a message received on the 27th.

18 And so I think the state of -- any state of mind argument
19 is more difficult. I understand it could be, but it seems to
20 me that Lines 2 through 17 are not proper, so I'm going to
21 sustain that objection.

22 With respect to all the other objections, the one that's
23 at issue is No. 614, and I'm going to sustain the objection as
24 to Pages 2 and 3, but allow the first page.

25 **MR. APTON:** Your Honor, those are Pages 2 and 3 of

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1 Exhibit 614?

2 **THE COURT:** 614. That comes up twice, I guess, for
3 two witnesses.

4 Otherwise, all the objections are overruled. And -- oh.
5 As to Mr. Egon, I'm going to sustain as to 178 on relevancy
6 grounds. So 178 is also out. And as far as Mr. Gracias,
7 that's water under the bridge at this point because those are
8 all mooted.

9 **MR. PORRITT:** And one administrative or housekeeping
10 matter on Mr. Durban. There are two exhibits which are his
11 text messages during the relevant time period. They're 174 and
12 182.

13 **THE COURT:** Was that on yesterday's list, or whose?

14 **MR. PORRITT:** They're listed for Mr. Durban. I can't
15 remember what day we initially disclosed them for Your Honor, I
16 apologize. But they were in his -- the (Inaudible) matter is
17 just a --

18 **THE COURT:** Okay, Durban, I see on day 6. What
19 numbers?

20 **MR. PORRITT:** Sorry. 174 and 182, Your Honor.

21 **THE COURT:** 174, there was no objection, according to
22 my table.

23 **MR. PORRITT:** Yes, Your Honor. So this involves
24 issues regarding confidentiality and redaction, Your Honor.

25 **MS. RIEWE:** Your Honor --

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1 **THE COURT:** Confidentiality and the what?

2 **MR. PORRITT:** And redacting. So --

3 **THE COURT:** Oh.

4 **MR. PORRITT:** We've reached an accommodation with
5 counsel for Silver Lake that for purposes of examination, both
6 174 -- and I think 182 is on defendants' list -- may be used
7 without restriction or without further redaction of the
8 witness.

9 We'll move their admission, but we'll later redact them.
10 We'll meet and confer over the weekend and we'll agree.
11 Because many of them -- it contained a lot of irrelevant and --
12 sometimes -- material, and so we'll meet and confer and agree
13 upon a version.

14 **THE COURT:** This raises the redaction question.

15 **MR. PORRITT:** Correct.

16 **MS. RIEWE:** Thank you, Your Honor. Julie Riewe from
17 Debevoise and Plimpton for Mr. Durban and Silver Lake.

18 So we appreciate the parties' accommodations on the large
19 text message exhibits. That's 174 and 182. We appreciate the
20 redactions for PII.

21 The question that we have and the concern we have today is
22 whether those large exhibits are going to be introduced as a
23 whole, as opposed to the pages that contain the particular
24 messages that the parties wants to show to the witness and the
25 jury.

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1 You know, we would object to the entire document being
2 shown to the jury and to the Court and to the courtroom.
3 There's a lot of third-party information in those compendiums.
4 It's totally irrelevant, as the Court noted last week. And so
5 we would ask the parties to limit it to the page that contains
6 the message that they want to show the witness.

7 **THE COURT:** Let me find out. What is the intent with
8 respect to its introduction in the courtroom?

9 **MR. PORRITT:** So in terms of examining Mr. Durban, we
10 would only show and publish to the jury the pages with the
11 relevant -- as you've seen during the course of the trial we
12 would, of course, highlight the relevant text that we wish to
13 examine him on. So we would move its admission, subject to
14 future redaction.

15 **THE COURT:** So ultimately what's going to be admitted
16 is a fully-redacted document. Correct?

17 **MR. PORRITT:** Correct. It will just have whatever the
18 parties, and working with counsel for Silver Lake, kind of
19 agree upon a version that can then be admitted as an exhibit
20 and also certainly uploaded to the District --

21 **THE COURT:** So the only concern would be in showing
22 the witness and the jury and the gallery the documents. Will
23 there be some PII or some other stuff that hasn't been redacted
24 that --

25 **MR. PORRITT:** On today, but we'll be limiting it just

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1 to the page for the relevant -- we'll be moving through and
2 highlighting relevant text messages. So I don't think it's
3 going to be an issue.

4 We've got no interest, obviously, in irrelevant
5 information to the jury, so that's not going to be our intent.
6 But Mr. Price might have something.

7 **MR. PRICE:** I would say, Your Honor, we have had
8 discussions, and we have blacked out specific things that
9 Silver Lake has asked us to. And -- however, we will move the
10 entire document in, and then we can -- we can discuss offline
11 what Silver Lake thinks is not relevant.

12 Most of these texts are relevant to the go-private
13 transaction.

14 **THE COURT:** Sure.

15 **MR. PRICE:** We don't care for the jury to see things
16 that are totally irrelevant. But today we're going to black
17 out the specific things that they asked. But we'll move the
18 entire document in subject to --

19 **THE COURT:** You'll move the entire document, but what
20 ultimately will be admitted is a redacted document.

21 **MR. PRICE:** Yes.

22 **THE COURT:** All right. Well, sounds like even today
23 they're going to black out some stuff, some PII.

24 **MS. RIEWE:** Yeah. As long as it's blacked out. We're
25 really concerned about today. We understand we'll work with

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1 the parties after today to submit a redacted document.

2 **THE COURT:** Yeah.

3 **MS. RIEWE:** Just one other point. Mr. Musk's text,
4 Exhibit 121 --

5 (Reporter clarification)

6 **THE COURT:** She wants you to slow down.

7 **MS. RIEWE:** Sure.

8 Exhibit 121, which is Mr. Musk's texts, they have some of
9 the same PII and redaction concerns. They contain Silver Lake
10 information, just the contra side of the text messages.

11 **THE COURT:** So the same treatment of 121? Is that
12 going to come up today?

13 **MS. RIEWE:** Correct. I don't know if that's coming up
14 today; I don't think so. But we would ask that the redactions
15 be mirrored in Mr. Musk's text.

16 **MR. PRICE:** I think that was admitted into evidence,
17 and we did black out specific confidential informational that
18 Silver Lake requested.

19 **MS. RIEWE:** Great. Thank you.

20 **THE COURT:** Has that -- that's the one -- we've been
21 waiting. Have you all -- today was the day it was promised
22 that you'd have the jointly redacted thing that we could
23 actually post to our public server.

24 **MR. PORRITT:** I think it's finally being delivered,
25 Your Honor. I think we delivered it this morning. Ms. Ayala

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1 will correct us if we're wrong. But we have been working a lot
2 with Silver Lake counsel, defendant counsel, to try to come up
3 with an agreed-upon version of 121.

4 **THE COURTROOM DEPUTY:** Yes.

5 **THE COURT:** Okay.

6 **MR. PORRITT:** Last remaining point, Your Honor.

7 Sorry, I appreciate, I understand we're already 50 minutes
8 late --

9 (Reporter clarification)

10 **MR. PORRITT:** One last point is, in light of the extra
11 time today, so we provided notice about Mr. Arnold, and then
12 also Steve Heston, our expert who will be next in our list, if
13 we get time today. We don't know if we will or not. But, he
14 is sort of next in the pipeline.

15 I understand defendants object. This is -- there were no
16 exhibits. I think it's is very unlikely we'll even finish his
17 direct examination today, unless -- it's very unexpected.

18 **MR. SPIRO:** If we're not beginning cross today, in the
19 spirit of expediency, you know, I defer to the Court on that.

20 One final thing, and then we'll obviously sit down,
21 eventually.

22 You know, I've made serial objections to certain things,
23 and I just want the Court to understand. In the most recent
24 round of exhibits and the filings regarding Mr. Arnold, they
25 argued that we waived, even though we made the original

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1 objection, because then we didn't object again and again. So
2 I'm just going to tell the Court that I'm going to have to
3 continue to make a record just to prevent that argument.

4 Because, they made that argument explicitly after I
5 understood --

6 **THE COURT:** And you've been doing that. You say:
7 Objection, Court need not rule because the Court -- or
8 whatever.

9 **MR. SPIRO:** Right. I'm just explaining to the Court
10 why I have to do that.

11 **THE COURT:** Right.

12 **MR. SPIRO:** Not because I want to.

13 **THE COURT:** I understand. I understand.

14 What do we know about the jurors?

15 **THE COURTROOM DEPUTY:** I have all of them except for
16 one. He's in a cab. He should be here within the next five
17 minutes.

18 **THE COURT:** Okay. They are all here except one is in
19 a cab, took the extra effort to get here, and will be here
20 shortly.

21 **THE COURTROOM DEPUTY:** Yes.

22 **THE COURT:** So get ready to go. We're going to start
23 in about five minutes.

24 (Off-the-Record discussion between the Court and Clerk)

25 **THE COURT:** And now we are having a problem with the

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1 audio feed to the public again, so our IT person is coming up,
2 so it may be more than three minutes. As soon as we get that
3 squared away, we will start.

4 **MR. SPIRO:** Thank you.

5 **THE COURT:** And the first witness, just so I have my
6 ducks in order?

7 **MR. PORRITT:** First witness will be Mr. Durban.

8 **THE COURT:** Okay we'll be back shortly.

9 (Recess taken from 8:47 a.m. to 9:01 a.m.)

10 (The following proceedings were held outside of the
11 presence of the Jury)

12 **THE COURT:** It's fixed; the jurors are here. Have a
13 seat, everyone. I think we should proceed. Let's go retrieve
14 the jury.

15 So in the interest of transparency, I'll let you know that
16 I brought my favorite candy bar for the jurors, which I was
17 going to give them anyway since it's Friday, but I think they
18 will be especially awake, because it's a dark chocolate with
19 quinoa crunch, which is very healthy, got a lot of caffeine.
20 It's the adult healthy version of Nestle's Crunch.

21 But they were -- we need to thank them this morning
22 because some of them really had to go through a lot to get
23 here, but I think they're very dedicated, so...

24 (A pause in the proceedings)

25 **THE COURT:** Oh, just to go on the record for a second.

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1 As you may know, Vicky's time allotment for the depo, I
2 think it was the Brinkman depo was a little off from yours.
3 We're not accusing anybody of under-counting, but I think she
4 was at 49 minutes, and you all had 44, and it allocated the 44
5 between the parties. But I have to go with the official
6 timekeeper.

7 So if you could let me know at some point the extra five
8 minutes, do you want to allocate it pro rata the same way you
9 did? Or --

10 **THE COURTROOM DEPUTY:** All rise for the jury.

11 (The following proceedings were held in the presence of
12 the Jury)

13 **THE COURT:** All right. Have a seat, everyone.

14 Well, good morning, members of the jury. I understand
15 that the commute, especially for those of you coming from the
16 East Bay, was particularly difficult this morning. And in
17 fact, some of my staff are still not here.

18 So, first of all, on behalf of the parties, as well as the
19 Court, let me thank you for your extra effort to get here. So,
20 we really appreciate that.

21 So, with that said, luckily we did allocate a little extra
22 time today. Again, thank you for that. So what we should do
23 is pick up where we left off yesterday, which was we're still
24 in the plaintiff's case. And the plaintiffs may call their
25 next witness.

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1 **MR. PORRITT:** Thank you, Your Honor. Plaintiff calls
2 Egon Durban.

3 **MS. RIEWE:** Mr. Durban's here, Your Honor.

4 **THE COURT:** Great. Thank you.

5 Why don't you come forward and take the stand, Mr. Durban.

6 **EGON DURBAN, PLAINTIFF'S WITNESS, SWORN**

7 **THE WITNESS:** Yes.

8 **THE COURTROOM DEPUTY:** Thank you. Please have a seat.

9 Please speak clearly into the microphone. State and spell your
10 first and last name for the record.

11 **THE WITNESS:** Egon Durban. E-G-O-N, D-U-R-B-A-N.

12 **THE COURT:** All right. Thank you, Mr. Durban.

13 **MR. PORRITT:** And Your Honor, I have a binder for the
14 Court and for the witness.

15 **THE COURT:** All right.

16 **MR. PORRITT:** May I approach?

17 **THE COURT:** Yes, you may.

18 **THE COURTROOM DEPUTY:** Thank you.

19 (Binder handed up to the Court)

20 (Binder tendered to the Witness)

21 **THE COURT:** Thank you.

22 **THE COURTROOM DEPUTY:** You are welcome.

23 **DIRECT EXAMINATION**

24 **BY MR. PORRITT**

25 **Q** Good morning, Mr. Durban.

1 **A** Good morning.

2 **Q** You are currently employed with Silver Lake Partners, is
3 that correct?

4 **A** Yes.

5 **Q** Could you state your title at Silver Lake?

6 **A** CEO and managing partner.

7 **Q** And how long have you been employed at Silver Lake
8 Partners?

9 **A** January, 1999.

10 **Q** So almost 25 years?

11 **A** Yes.

12 **Q** Okay. And prior to Silver Lake you were with Morgan
13 Stanley, isn't that correct?

14 **A** Yes.

15 **Q** Okay. And you're a graduate of Georgetown University?

16 **A** Yes.

17 **Q** Okay. Could you briefly tell us what Silver Lake Partners
18 is?

19 **A** It's an investment firm, primarily private equity focused
20 on the technology and technology-enabled industries.

21 **Q** Okay. And as part of that public business, does it also
22 consider and participate in going-private transactions?

23 **A** Yes.

24 **Q** And in 2018, you were also managing partner of Silver Lake
25 at that time?

DURBAN - DIRECT / PORRITT

1 **A** Yes.

2 **Q** Okay. And was one of the going-private transactions you
3 participated in the going-private transaction involving Dell?

4 **A** Yes.

5 **Q** Okay. Now, briefly, in Dell -- or I'll go back a step.
6 Could you, again for the benefit of the jury, just briefly
7 describe what the going-private transactions involved that
8 you've been involved in?

9 **A** I've been involved directly in overseeing SunGard, which
10 was done in 2005, and Dell Technologies.

11 **Q** And those were public companies that went private, is that
12 correct?

13 **A** Yes.

14 **Q** And what does it mean for a company that's public to go
15 private?

16 **A** It's a publicly-traded company and has listed shares that
17 has a stock price; you can pull it up on a computer or in the
18 newspaper. And you end you delisting it, so you acquire all of
19 the shares and take it private.

20 **Q** And in SunGard and Dell, did the company, after it went
21 private, retain any retail investors?

22 **A** No.

23 **Q** Are you aware of any going-private transaction where that
24 has occurred?

25 **A** No.

1 **Q** Now, you recall you had a telephone conversation with
2 Mr. Musk on the evening of August 6th, 2018? Is that correct?

3 **A** Yes.

4 **Q** Okay. Approximately how long was the telephone call?

5 **A** I don't recall but if I had to estimate today -- I don't
6 recall specifically -- 30 minutes, plus or minus, something
7 like that.

8 **Q** Okay.

9 **MR. PORRITT:** At this point, if I could show to the
10 witness Exhibit 175, Your Honor.

11 **THE COURT:** Okay.

12 (Document displayed to the Witness)

13 **BY MR. PORRITT**

14 **Q** Do you see 175 in front of you?

15 **A** Oh, great, yes.

16 **Q** And it is also in your binder if --

17 **A** Yes, I'll use the screen. Perfect.

18 **Q** Okay. Do you recognize Exhibit 175?

19 **A** Yes. It's my handwriting.

20 **Q** Okay. Are these your handwritten notes taken during the
21 call with Mr. Musk on August 6th, 2018?

22 **A** Um, yes.

23 **Q** Okay.

24 **MR. PORRITT:** At this point we would move to admit
25 Exhibit 175, Your Honor.

1 **MR. PRICE:** No objection.

2 **THE COURT:** All right. Admitted.

3 (Trial Exhibit 175 received in evidence.)

4 **MR. PORRITT:** We will publish these to the jury?

5 **THE COURT:** Yes, you may.

6 (Document displayed)

7 **BY MR. PORRITT**

8 **Q** And what was the purpose of your -- strike that.

9 Why was Mr. Musk calling you on August 6, 2018?

10 **A** He was exploring an interest in the opportunity to take
11 Tesla private.

12 **Q** And if you look at the top left-hand corner on
13 Exhibit 175, again, these are your notes?

14 Correct?

15 **A** Yes.

16 **Q** Okay. And could you -- could you -- well, I guess I'll go
17 back. What do you recall Mr. Musk telling you during that
18 conversation on August 6, 2018?

19 **A** He -- he -- I mean, as you can see from the notes here, he
20 was interested in going private. Being public was painful. He
21 was spending a fair amount of time managing the business
22 through corporate, you know, sort of governance,
23 administration, and, you know, the things that are required to
24 be public including, you know, investor relations.

25 There was a lot of short positions in the company at the

1 time. And he had spoken with Michael -- that's Michael Dell,
2 who took his company public -- or, sorry, took his company
3 private with Silver Lake back in 2013. And he was prepared to
4 take the company -- or -- private. Just to summarize.

5 **Q** And these notes at the top left corner, do these reflect
6 the things that Mr. Musk said to you during the conversation?

7 **A** Yes.

8 **Q** Okay. And you've got there, I see, the fourth point down,
9 "Public painful"?

10 **A** Yes.

11 **Q** Are those Mr. Musk's words, or that's your paraphrase?

12 **A** I don't recall.

13 **Q** And then, and then, at the bottom of that list, if you
14 like, there's the "11 to 12 billion short"? Am I reading those
15 notes correctly?

16 **A** Yes.

17 **Q** That's the short seller interest you're referring to?

18 **A** Yes, I believe so.

19 **Q** My eyesight's poor, I'll hold this letter up.

20 Then, just below that on Exhibit 175, you've got the
21 "No..." I think that's a delta sign? Is that correct? "...of
22 control"?

23 **A** Correct. "No change of control."

24 **Q** Okay. So that's what that means?

25 What do you recall -- what are those notes referring to,

1 if you recall?

2 **A** If I look at it in the context -- to the right, it says

3 (As read) :

4 "Major investors to remain investors, roll
5 into spv, encourage investors to stay as
6 investors."

7 It was this concept of -- that he had to roll over a
8 substantial amount of his shareholders. Not in number of
9 shareholders, but as expressed in capital.

10 **Q** Okay. And on the right-hand side of Exhibit 175, you've
11 got "Shareholder account below 300"? Is that right?

12 **A** Correct.

13 **Q** Okay. What is that referring to?

14 **A** I believe it's, um, the number of shareholders required
15 for him that -- oh, God, I can't remember. I just can't
16 recall. I think there's a number -- there's a maximum number
17 of shareholders you can have in a -- in a company which has
18 been delisted. I think that's what that refers to.

19 **Q** Okay.

20 **A** I can't remember the technical law.

21 **Q** So --

22 **A** But we -- you know, I think the concept was to have less
23 than 300 total shareholders roll into the deal, into this SPV.

24 **Q** Okay. And just to be clear, I mean, you don't have a law
25 degree; isn't that correct?

1 **A** No.

2 **Q** Okay. So you --

3 **A** No.

4 **Q** -- a working knowledge as a businessman of securities laws
5 and other laws?

6 **A** Yes.

7 **Q** Okay. So we're not going to ask you for any legal
8 opinions. We understand that today.

9 **A** Thank you. Thank you.

10 **Q** But your general understanding is that if you have more
11 than 300 shareholders, you can't be a private company. Is that
12 correct?

13 **A** Correct.

14 **Q** Okay. And is this something that Mr. Musk explained to
15 you during this telephone call?

16 **A** I believe so, yes.

17 **Q** Okay. So Mr. Musk described to you a contemplated
18 structure for this going-private transaction?

19 **A** Yes.

20 **Q** Okay. Do you recall what your reaction to that proposed
21 structure was?

22 **A** I -- I believe I used the words "unprecedented."

23 **Q** Okay. You said that to Mr. Musk?

24 **A** I don't recall saying it to him, but I -- I definitely
25 used it in subsequent testimony with the SEC.

1 **Q** Okay. You had never heard of this sort of structure being
2 used before?

3 **A** I haven't seen it in my professional career.

4 **Q** Okay. Now, there's also reference in the top right-hand
5 corner of Exhibit 175, it's got:

6 "Saudis and UAE and Qatar."

7 I know we just had a World Cup there.

8 **A** Yes.

9 **Q** I never know how to pronounce it properly, so I apologize.
10 What is that referring to?

11 **A** I believe it -- just, I believe it was in reference to
12 potential investors in the going-private -- or the transaction
13 as contemplated, that would be third-party investors and help
14 finance it.

15 **Q** And then, finally, on the bottom right you've got:

16 "10:00 a.m. Friday."

17 Do you see that?

18 **A** Yes.

19 **Q** Okay. What's that referring to?

20 **A** I think that's when we tentatively agreed to meet in
21 person.

22 **Q** Okay. And August 6th was a Monday evening? I'll
23 represent to you it was a Monday evening.

24 **A** Yes.

25 **Q** So Friday would be the 10th of August?

1 **A** Yes.

2 **Q** And then immediately, immediately below the -- your notes
3 about no change of control, there's some other notes. Are
4 those notes of your conversation with Mr. Musk?

5 **A** Can you -- sorry.

6 **Q** See the note, 1, 2, 3?

7 **A** Can you scroll down, please?

8 (Document displayed)

9 **A** I think these are notes that I made to myself, actually.

10 **Q** Okay. These are notes you made after the call to
11 yourself?

12 **A** Or during or post. I can't recall.

13 **Q** Okay. And then notably in that structure you've got an
14 arrow to the right saying:

15 "Silver Lake/Affiliates, 6B."

16 Six billion? Do you see that?

17 **A** Yes.

18 **Q** Can you explain what you were referring to there?

19 **A** I've reviewed some other documents preparing for this.

20 I think that would have been potentially how much we could
21 have invested, committed to with our limited partners.

22 **Q** Okay.

23 **A** I think in a subsequent document that was used at that
24 Friday meeting we showed 7 to 10 billion.

25 **Q** We'll get to that later on.

1 **A** Yeah.

2 **Q** Is that an amount that you communicated to Mr. Musk during
3 this telephone call?

4 **A** I don't recall.

5 **Q** Okay. At 6 billion, would that have been the largest
6 raise you would have made with your fund at that particular
7 point in time?

8 **A** Was this, 2018?

9 **Q** Yes.

10 **A** Um, with co-invest? If not the largest, it would have
11 been the one, two or three -- second or third largest.

12 **MR. PORRITT:** Very good. If I could show to the
13 witness Exhibit 174.

14 (Document displayed to Witness)

15 **BY MR. PORRITT**

16 **Q** Do you see 174, Mr. Durban?

17 **A** Yes.

18 **Q** Do you recognize 174? It's a long document, I know,
19 but --

20 **A** I haven't seen this in four and a half years, but -- but I
21 assume -- it's a text exchange between me and Kyle Paster,
22 who's a partner at Silver Lake, who worked on this with me.

23 **Q** 174 is a lengthy document, I'll represent -- well, 174 is
24 your text messages during the relevant time period.

25 **MR. PORRITT:** Subject to future redaction, Your Honor,

1 at this point we would move to admit 174.

2 THE COURT: Any objection?

3 MR. PRICE: No objection.

4 THE COURT: Admitted.

5 (Trial Exhibit 174 received in evidence.)

6 MR. PORRITT: Please, if the deputy would hold off
7 publishing to the jury until we turn to Page 16, 174.

8 (Document displayed to the Witness)

9 THE COURT: All right. Do you want that published?

10 MR. PORRITT: Yes, please, Your Honor.

11 THE COURT: Okay. You may publish.

12 (Document displayed)

13 BY MR. PORRITT

14 Q If I refer you to -- you have record numbers on the side
15 there -- to 1595.

16 (Document highlighted)

17 Q And I'll also represent to you that the times as indicated
18 at the top are in UTC time, so that's seven hours ahead of
19 Pacific time.

20 A Okay.

21 Q So by my math, which is not as good as your math, I make
22 this at 7:43 p.m. You have a text message there to Mike Bingle
23 and others, saying (As read) :

24 "Elon called, may have dough/strk..."

25 S-T-R-K, is that structure?

1 **A** Yes.

2 **Q** "....already." Is this a text that you sent after your
3 telephone conversation with Elon Musk?

4 **A** Yes.

5 **Q** And does this, this text reflects information that Elon
6 Musk told you during that conversation?

7 **A** Yes.

8 **Q** And just immediately further down, Record No. 1599, let's
9 see, if you look at 1598 and 1599, you see that also.

10 "Full p2p."

11 Do you see that?

12 **A** Yes.

13 **Q** Can you explain to the jury what you mean by "p2p"?

14 **A** Public to private.

15 **Q** And that's what we were talking about earlier, which is
16 the public shares of Tesla would be bought, and the company,
17 itself, would go private with less than 300 shareholders?

18 **A** Yes.

19 **MR. PRICE:** Objection. The latter misstates.

20 **THE COURT:** All right. Sustained.

21 **BY MR. PORRITT**

22 **Q** And then 1399 says "He has dough"?

23 **A** Yes.

24 **Q** And that's sent a couple minutes after the preceding
25 message that he may have dough; do you see that?

1 **A** Yes.

2 **Q** Okay. Who is Mike Bingle and the other recipients of
3 those text messages?

4 **A** My three partners in the firm.

5 **Q** So by these text messages, you're reporting the contents
6 of your telephone conversation with Elon Musk to your
7 co-partners?

8 **A** Yes.

9 **Q** Okay. Finally --

10 **MR. PORRITT:** If we can go to the next page, Derek,
11 174-17.

12 (Document displayed to the Witness)

13 **BY MR. PORRITT**

14 **Q** Do you see record 1603 there (As read) :

15 "Saudi UAE Qatar - he has talked to them.

16 Believes his major shareholders roll into
17 private spv. We talked Apple but no bite."

18 Do you see that?

19 **A** Yes.

20 **Q** "Spv," what is that referring to?

21 **A** Special purpose vehicle.

22 **Q** And is that the structure that you were talking about that
23 you heard from Mr. Musk, that was unprecedented in your mind?

24 **A** Yes.

25 **Q** And again, this text message is consistent with your notes

1 we saw in 175. Correct?

2 **A** Yes.

3 **Q** Were you relying on your notes when you sent these text
4 message?

5 **A** That, and my conversation.

6 **Q** And the meeting that you had arranged for August 10th,
7 what was going to be the purpose of that meeting?

8 **A** To discuss the going private transaction.

9 **Q** Okay. At this point, was Silver Lake formally engaged in
10 any way to participate in a go-private with Tesla?

11 **A** No.

12 **Q** Had you, in your own mind, decided whether you would
13 participate or not?

14 **A** No.

15 **Q** Were you planning to decide that between August 6th and
16 August 10?

17 **A** No.

18 **MR. PORRITT:** If I could produce to the witness
19 Exhibit 177.

20 (Document displayed to the Witness)

21 **BY MR. PORRITT**

22 **Q** Do you recognize Exhibit 177?

23 **A** Yes.

24 **Q** It's an email from Kyle Paster to you and others, is that
25 correct?

1 **A** Yes.

2 **MR. PORRITT:** At this point we would move to admit
3 Exhibit 177.

4 **MR. PRICE:** No objection.

5 **THE COURT:** Admitted.

6 (Trial Exhibit 177 received in evidence.)

7 **THE COURT:** You may publish.

8 (Document displayed)

9 **BY MR. PORRITT**

10 **Q** So I think you said Kyle Paster is one of your colleagues
11 at Silver Lake?

12 **A** Yes.

13 **Q** Was this the first time estimate you had seen the tweet
14 "Am considering taking Tesla private at \$420. Funding
15 secured"?

16 **A** That day. Yes.

17 **Q** Okay. What was your reaction when you first read that
18 tweet?

19 **A** I -- I don't recall specifically, other than being
20 surprised.

21 **Q** Okay. Why would you -- why were you surprised?

22 **A** I'm sure I had a lot of words that I sent around to other
23 folks.

24 **Q** Why were you surprised that Mr. Musk tweeted out this
25 information?.

1 **A** We had just spoken the night before, and he described, in
2 context or in concept, a deal to take the company private. We
3 were meeting later that week to discuss it.

4 It's atypical in my experience for a CEO to announce
5 something like that publicly, in the middle of exploring an
6 opportunity to take a business private.

7 **Q** Okay.

8 **A** I can't think of other examples, actually.

9 **Q** In your experience, is it typical for some form of
10 definitive agreement to be in place before a public
11 announcement of a going-private transaction is made?

12 **A** Yes.

13 **Q** Okay. And typically, financing is arranged before a
14 definitive agreement is signed for a going-private?

15 **A** Yes.

16 **Q** And to your knowledge, was there any definitive agreement
17 in place with regard to the potential going-private transaction
18 of Tesla at this point in time?

19 **MR. PRICE:** Objection, lack of foundation.

20 **THE COURT:** Lay a foundation?

21 **MR. PORRITT:** I asked him to his knowledge, was there
22 any definitive agreement in place. I'm attempting to lay a
23 foundation.

24 **THE COURT:** Okay, overruled.

25

1 BY MR. PORRITT

2 Q To your knowledge, was there any definitive agreement in
3 place at this time regarding a going-private transaction for
4 Tesla?

5 A No.

6 Q And is it a lengthy process to get to a definitive
7 agreement for a going-private transaction?

8 MR. PRICE: Objection; vague and lack of foundation.

9 THE COURT: Why don't you rephrase that.

10 BY MR. PORRITT

11 Q You have experienced at least two going-private
12 transactions which have concluded, correct?

13 A Yes.

14 Q In those transactions, was it a lengthy process to get to
15 a definitive agreement?

16 A In my experience, specifically in my two, it was three to
17 six months.

18 Q Now, the second sentence in Mr. Musk's tweet forwarded to
19 you in Exhibit 177 says "Funding secured." Were you surprised
20 to see that as well?

21 A Yes.

22 Q And then after this August 7th tweet, you then spent the
23 next two weeks trying to raise funding. Isn't that correct?

24 A Yes.

25 Q After the August 6th telephone conversation you then met

1 with Mr. Musk on August 10th, is that correct?

2 **A** Yes.

3 **Q** Okay. In between August 6th and this tweet August 7th and
4 the August 10th meeting, could you briefly describe what you
5 and your team did?

6 **A** We did work on the company, looking at public information
7 that's available. Research reports, public company filings.
8 Did some work around financial analysis. Did some work around
9 transaction structure, and outlined a process around what it
10 would take to potentially get the company private, based on our
11 set of experiences.

12 **Q** And was part of that building, starting to build what's
13 called the so-called business case for going-private? Is that
14 fair?

15 **A** Maybe more like an investment case.

16 **Q** Okay.

17 **A** Yeah.

18 **Q** And what is -- what -- explain what you mean when you say
19 "An investment case for going private."

20 **A** The way you think about -- I'll try to do this quickly --
21 you've got a company, how it operates in an industry, its
22 competitive dynamics. The -- ultimately, their ability to
23 generate product and sell product.

24 That leads to a set of financials, not just what's
25 happened historically in a business model. So you get from

1 sales down to cash flow. And then the ability to, you know,
2 sort of project that forward.

3 As part of that you value a company based on the set of
4 projections and ultimately determine whether the value that
5 you're required to pay for something, like if you're paying for
6 a house or any asset, is worth it based on, you know, your view
7 of potential appreciation and its ability to generate the cash
8 flows, depending on the transaction structure and how much debt
9 there is, and all sorts of other stuff.

10 **Q** And you met Mr. Musk at his house in Los Angeles on
11 August 10th?

12 **A** Yes.

13 **Q** How long did that meeting last?

14 **A** I believe it was one to two hours, if I recall correctly.

15 **Q** And you made a presentation to Mr. Musk?

16 **A** Um, I brought a presentation, yes.

17 **Q** Okay.

18 **MR. PORRITT:** At this point -- actually, I think it is
19 in evidence. If I can show to the witness and publish to the
20 jury the Exhibit 179.

21 **THE COURT:** Okay.

22 (Document displayed)

23 **BY MR. PORRITT**

24 **Q** Do you recognize Exhibit 179?

25 **A** Yes.

1 **Q** Okay. And this is the presentation you brought to your
2 meeting with Mr. Musk on August 10th?

3 **A** I'm going to -- I'm going to -- I believe so. I don't --
4 I haven't seen the rest of it but --

5 **Q** Okay.

6 (Documents displayed)

7 **Q** Why don't you quickly -- we'll talk about a couple of
8 pages, so if you want to flip --

9 **A** Yes, this looks like what we brought.

10 **Q** Okay --

11 **A** Or I brought.

12 **Q** Slipping to Page 4, let's see, we're right there.

13 "Illustratively Transaction Setup." Do you see that?

14 **A** Yes.

15 **Q** Can you explain just briefly what is outlined on this
16 slide? I know there's a lot of information there.

17 **A** What's outlined here is -- lays out taking the business
18 private, and the amount of money that would be required to do
19 so. And ways to potentially raise that money.

20 **Q** And it presents two scenarios of taking private? Is that
21 correct?

22 **A** Correct.

23 **Q** Okay. But -- and is that because at this time, there was
24 no agreed structure at this point in time, you're sort of
25 exploring structures? Is that correct?

A Not that I was aware of.

Q Okay. So you were -- you were still presenting alternative structures, is that correct?

A Correct.

Q Okay.

Q At this point in time you had not spoken with any potential investors concerning Tesla going-private transaction? Is that correct?

A Yes.

Q Okay. At this point in time, did you know what percentage of existing Tesla shareholders might want to participate in a going-private -- in a private Tesla?

A **No.**

Q If you would turn to Slide -- or it's Page 179, 16. It is either Slide 15 or 16.

(Document displayed)

Q "Alignment with Sovereign Wealth Fund Investment." Do you see that?

A Yes.

Q You recall -- why did you include this slide in the slide deck?

A Sources of capital, based on our first conversation. A large source of external capital would have come from Sovereign wealth funds. Sovereign wealth funds also make up a portion of our investor base as well.

1 **Q** Okay. So this is the reference to the Saudis, UAE, Qatar?

2 **A** Yes.

3 **Q** Okay. And there are other sovereign wealth funds,
4 correct, that participate? Singapore, Norway?

5 **A** Correct.

6 **Q** And you subsequently had a conversation with Yasir
7 Al-Rumayyan at the Saudi PIF. Isn't that correct?

8 **A** Yes.

9 **Q** Okay. When you had your conversation with Yasir, did you
10 discuss any price of a Tesla going-private?

11 **A** I don't recall.

12 **Q** Did you discuss any specific amount of funding that PIF
13 could provide?

14 **A** I don't recall.

15 **Q** Okay. Did you discuss a percentage investment that Saudi
16 PIF might be willing to make in a private Tesla?

17 **A** I don't recall.

18 **Q** Okay. If you could refer to Page 29 of Exhibit 179.

19 (Document displayed)

20 **Q** This again is consistent with what you previously
21 testified, that it might take about four to six months to
22 conclude a going-private transaction?

23 Is that correct?

24 **A** Yes.

25 **Q** Okay. And the first point is:

1 "Submit formal proposal to board following
2 arrangement of committed financing."

3 Is that correct?

4 **A** Yes.

5 **Q** As of August 10, 2018, was there any committed financing
6 for the Tesla or a potential Tesla go-private transaction?

7 **MR. PRICE:** Objection, vague and lack of foundation.

8 **THE COURT:** Overruled.

9 **THE WITNESS:** Not that I was aware.

10 **BY MR. PORRITT**

11 **Q** Was there ever any committed financing for a Tesla
12 go-private transaction?

13 **MR. PRICE:** Same objections.

14 **THE COURT:** Overruled.

15 **THE WITNESS:** Not that I was aware.

16 **BY MR. PORRITT**

17 **Q** And no formal proposal had yet been admitted to the Tesla
18 board, is that correct?

19 **MR. PRICE:** Objection, vague.

20 **THE COURT:** Overruled.

21 **THE WITNESS:** Not that I was aware.

22 **BY MR. PORRITT**

23 **Q** So by August 10th, 2018, from your perspective, the
24 potential going-private transaction for Tesla was not even yet
25 at Stage 1. Is that fair?

1 **MR. PRICE:** Objection, leading.

2 **THE COURT:** Overruled.

3 **THE WITNESS:** Yes.

4 **BY MR. PORRITT**

5 **Q** It was not -- it was not at Stage 1, I guess is my
6 question.

7 **A** Yes.

8 **Q** Do you recall what the -- you know, what was the outcome
9 or the next steps that were to occur following the August 10th
10 meeting with Elon Musk?

11 **A** Um, somewhere over the next couple of days -- maybe it was
12 that day, or in the moment, or a day or two later -- we agreed
13 to work together to try to help him organize this.

14 Next steps were, you know, formulating diligence and a
15 business plan, and an investment case and then reaching out
16 ultimately to potential investors who would want to participate
17 in a going-private of Tesla.

18 **MR. PORRITT:** If I can go back to Exhibit 174,
19 Page 23.

20 (Document displayed)

21 **MR. PORRITT:** And, Record 2018.

22 (Document displayed)

23 **BY MR. PORRITT**

24 **Q** Do you see that text message?

25 **A** Yes.

Q Okay. And you write:

"Fun fact...saudis apparently don't have cash lying around."

Do you recall what you are referring to there in that text message?

A I don't. I think what I -- well, I don't recall specifically. I would have to look it up. But I think around this time they were funding public investments and private investments on margin, which is, you know, something you do when you don't have immediate cash liquidity on hand.

MR. PORRITT: And then if we can go to 174-7, and Record 2240.

(Document displayed)

MR. PORRITT: Now we're on to -- on August 11th.

BY MR. PORRITT

Q Do you see that message to Kyle Paster there?

A Yes.

Q Okay. You refer to:

"We will need to be ready to manage the largest fund raise in history - credibly"

A Yes.

Q Is that what you sort of understood your task to be as of August 11th, 2018, for the Tesla go-private transaction?

A Yes.

MR. PORRITT: And if you can go to the next page,

1 174-8, and it is Record 2294.

2 (Document displayed)

3 **BY MR. PORRITT**

4 **Q** It's another text message to you and Kyle Paster.

5 "He mentioned they want to own the whole
6 company. Build giga factory...not
7 interested..."

8 Do you see that?

9 **A** Yes, yes.

10 **Q** Is the "he" there Elon Musk?

11 **A** Yes.

12 **Q** Okay. And do you recall what this -- do you recall your
13 conversation with Elon Musk that this text is referring to?

14 **A** Not specifically. I recall the Saudis wanted to build --
15 wanted him to build a factory, stimulate economic growth.

16 And when I see the words "not interested" I just don't
17 know if it's him not interested or me not interested. But,
18 somebody wasn't interested.

19 **Q** Do you recall what Mr. Musk's attitude was towards the
20 idea that the Saudi PIF would own all of Tesla?

21 **A** I don't think he was interested in that, based on my
22 recollection.

23 **Q** Do you recall that he wanted to have no investor bigger
24 than his own -- his current investment in Tesla, approximately?

25 **A** Yes, vaguely, yes.

Q And at that point Mr. Musk's interest was approximately 20 percent of Tesla?

A Yes.

Q We've seen a few text messages. Only a handful of the messages with Kyle Paster. Is it fair to say that you and Kyle Paster were exchanging a lot of text messages over these few days?

A Yes.

Q And just so the record's clear, August 11th obviously is a Saturday. So you're working weekends as well?

A All weekends. All the time.

MR. PORRITT: If I could show the witness Exhibit 181.

(Document displayed to the Witness)

THE COURT: Okay.

BY MR. PORRITT

Q Do you recognize Exhibit 191, Mr. Durban?

A Yes.

Q It's an email you sent to Mr. Musk?

A Yes.

Q Okay.

MR. PORRITT: At this point we would move the
n of Exhibit 181.

MR. PRICE: No objection.

THE COURT: Admitted.

(Trial Exhibit 181 received in evidence.)

1 (Document displayed)

2 BY MR. PORRITT

3 Q Attached to this email -- and we won't go through them,
4 you'll be pleased to know -- there are excerpts from SEC
5 filings connecting with -- connected -- in connection -- or
6 relating to the Dell going-private transaction?

7 Is that right?

8 A Yes.

9 Q Okay. Why did you send these to Mr. Musk?

10 A Provide some background on other things that we'd done
11 that were similar in delisting public companies.

12 Q Okay. To educate him on the process of going private?

13 A Yes.

14 Q Okay. At this time, after you decided to help Mr. Musk
15 with the going-private transaction, do you recall what
16 particular issues your team was grappling with?

17 A I'd put it in two buckets. One was sort of due diligence
18 and investment case, you know. And the second bucket is how
19 you finance it, given the size and scale of it.

20 Q Okay. And was one of the issues you were looking at this
21 novel structure that Mr. Musk was interested in pursuing?

22 A Yes.

23 Q Okay. If I can refer you back to Exhibit 174, Page 12.

24 (Document displayed)

25 Q And I think it is Record 2556.

1 (Document enlarged)

2 BY MR. PORRITT

3 Q And this is from Kyle Paster to you, stating (As read) :

4 "Do you want us to provide advice on
5 structure? It's quite unique, so need
6 lawyers to help navigate."

7 Do you see that?

8 A Yes.

9 Q Okay. Is this consistent with your understanding that,
10 you know, this structure was unique, and you were seeking
11 actual legal advice?

12 A Yes.

13 Q Okay. And then, just immediately down that same page,
14 Record 2570.

15 (Document enlarged)

16 Q Once again, Mr. Pastor uses the word "unique" to describe
17 the proposed structure. Is that right?

18 A Yes.

19 Q So is it fair to say that by August 13th when these texts
20 were sent, Silver Lake still didn't have a full understanding
21 of whether the proposed structure would be viable, from a legal
22 perspective?

23 A Yes.

24 Q Okay.

25 MR. PORRITT: If we can refer the witness to Exhibit

1 185.

2 (Document displayed to the Witness)

3 **BY MR. PORRITT**

4 **Q** Do you recognize Exhibit 185?

5 **A** Yes.

6 **Q** Okay. It's an email from you to Stephen Rosenblum and
7 others?

8 **A** Yes.

9 **Q** Okay.

10 **MR. PORRITT:** At this the point we would move to admit
11 185.

12 **THE COURT:** Admitted.

13 **MR. PORRITT:** Publish to the jury please?

14 (Trial Exhibit 185 received in evidence.)

15 (Document displayed)

16 **BY MR. PORRITT**

17 **Q** And in Exhibit 185, it says that you are caught up with
18 Dan. Do you see that?

19 **A** Yes.

20 **Q** Okay. Who is Dan, in this context?

21 **A** Dan Dees from Goldman Sachs.

22 **Q** Okay. And at this point in time, was Dan Dees also
23 involved in the Tesla going-private transaction?

24 **A** Yes. He was advising Tesla. Or, I guess, Elon.

25 **Q** Okay.

1 **A** Elon.

2 **Q** So you and he were sort of teaming up together to help
3 Elon?

4 **A** Yes.

5 **Q** Okay. Did you think Elon Musk needed help at this point
6 in managing a going-private transaction?

7 **MR. PRICE:** Objection. Irrelevant, vague.

8 **THE COURT:** Well, vague. Can you be more specific?

9 **MR. PORRITT:** Well, I'll move on, Your Honor.

10 **BY MR. PORRITT**

11 **Q** So at the bottom there, after you say "Dan and I just
12 caught up," this is on August 14th, you write (As read) :

13 "We will do a call later today with you and
14 our teams on outlining work items" -- I think
15 that's "investment analysis, including table
16 of contents, Financing targets, transaction
17 structure, legal/accounting, special
18 committee process."

19 Do you see that?

20 **A** Yes.

21 **Q** Does that describe the list, the short list of issues you
22 were working through as of August 14th, 2018?

23 **A** Yes.

24 **Q** Okay. Now, you met again with Mr. Musk on August 15th?
25 Is that correct?

1 **A** Was that Thursday? I can't --

2 **Q** That's a Wednesday.

3 **A** Wednesday. Yeah, so -- I think it was the 15th. I can't
4 -- 15th, 16th, 14th, somewhere in there.

5 **Q** Why don't we show you Exhibit 190.

6 (Document displayed to the Witness)

7 **BY MR. PORRITT**

8 **Q** Do you recognize Exhibit 190?

9 **A** Yes, that is my handwriting and my notes.

10 **MR. PORRITT:** At this point we move for the admission
11 of Exhibit 190, Your Honor.

12 **THE COURT:** Any objection?

13 **MR. PRICE:** No objection.

14 **THE COURT:** Admitted. You may publish.

15 (Trial Exhibit 190 received in evidence.)

16 (Document displayed)

17 **BY MR. PORRITT**

18 **Q** Does this refresh your recollection that you met with
19 Mr. Musk on August 15th?

20 **A** Yes.

21 **Q** Okay. Do you recall what the purpose of this meeting was?

22 **A** State of the union, talk about where we were, and
23 ultimately strategize on which parties to call to invite to
24 potentially participate in the going-private.

25 **Q** And as part of that, did you ask Mr. Musk to give you a

1 detailed description of any conversations he may have had with
2 potential investors?

3 **A** Yes.

4 **Q** Okay.

5 **MR. PORRITT:** And, if I could show the witness Exhibit
6 191.

7 (Document displayed to the Witness)

8 **BY MR. PORRITT**

9 **Q** Do you recognize Exhibit 191?

10 **A** Yes. Yes. Sorry.

11 **Q** These are more handwritten notes?

12 **A** Yes.

13 **MR. PORRITT:** At this point we move for the admission
14 of Exhibit 191.

15 **MR. PRICE:** No objection.

16 **THE COURT:** Admitted. You may publish.

17 (Trial Exhibit 191 received in evidence.)

18 (Document displayed)

19 **BY MR. PORRITT**

20 **Q** And are these notes you took during your meeting with
21 Mr. Musk on August 15th, 2018?

22 (Witness examines document)

23 **A** Yes. I was just confused by the "1/17" at the top. I
24 don't know what that refers to, but...

25 **Q** Okay. So on the left, there's some comment, there's some

1 words written down under the heading "Saudi." Do you see that?

2 **A** Yes.

3 **Q** Do you know what those notes are referring to?

4 **A** I believe his -- his conversations and Tesla's experiences
5 with the Saudis.

6 **Q** Okay. And then, just to the right of that, you see
7 there's a word there saying "insecure"? Do you see that?

8 **A** Yes.

9 **Q** Do you know what that is referring to?

10 **A** No.

11 **Q** And lower down on Exhibit 191, you see there's also a
12 reference to "UAE"?

13 **MR. PORRITT:** Keep scrolling down, Derek.

14 (Document displayed)

15 **BY MR. PORRITT**

16 **Q** Do you see that?

17 **A** Yes.

18 **Q** Again, do you know what that's referring to?

19 **A** Um, I think he met with Khaldoon from Dubai about a year
20 and a half ago.

21 **Q** Okay.

22 **A** Maybe in Dubai. If I recall.

23 **Q** And you referenced -- was it Abdallah --

24 **A** Mubadala, it's the sovereign wealth fund or one of the
25 sovereign wealth funds of the UAE.

1 **Q** And the UAE is --

2 **A** The United Arab Emirates, country.

3 **Q** Do you recall what the take-away from this meeting was on
4 August 15th, with Mr. Musk?

5 **A** We had alignment on a series of -- well, we got updated on
6 various conversations that Mr. Musk had had with various
7 potential investors, and look -- came -- I think this set the
8 pretext for us seeking approval for a list of potential
9 financing sources to call later in the next -- whenever that
10 was, you know, the 19th, 20th, 21st of August of '18.

11 **Q** And, seek approval from whom?

12 **A** The special committee. And their advisers.

13 **Q** Okay. This was a special committee of Tesla's board of
14 directors?

15 **A** Correct.

16 **Q** And why would you seek approval of the special committee
17 of Tesla board of directors to reach out to potential
18 investors?

19 **A** That's good legal process, in my experience.

20 **MR. PORRITT:** If I could introduce to the witness
21 Exhibit 194.

22 (Document displayed to the Witness)

23 **BY MR. PORRITT**

24 **Q** Do you see that in front of you, Mr. Durban?

25 **A** Yes.

1 **Q** And this is another email you sent on August 16th, now,
2 2018?

3 **A** Yes.

4 **MR. PORRITT:** At this point we would move to admit
5 Exhibit 194, Your Honor.

6 **MR. PRICE:** No objection.

7 **THE COURT:** Admitted.

8 (Trial Exhibit 194 received in evidence.)

9 **MR. PORRITT:** If we can publish it to the jury,
10 please.

11 **THE COURT:** Yes.

12 (Document displayed)

13 **BY MR. PORRITT**

14 **Q** So, listed there are some potential investors, is that
15 correct? Saudi Arabia, UAE, et cetera?

16 **A** Yes.

17 **Q** Okay. And these are the sources that you discussed with
18 Mr. Musk at the meeting on August 15th, 2018?

19 **A** Yes. Mr. Musk, and Goldman Sachs was also present.

20 **Q** Did Mr. Musk list any other sources of potential
21 investment, other than these six names?

22 **A** I can't recall. We'd have to go look at the notes. But
23 --

24 **Q** Okay. Well, we can go back to Exhibit 191, your
25 handwritten notes.

1 (Document displayed)

2 **Q** Would you have written down every investor, potential
3 source that Mr. Musk would have mentioned during that meeting?

4 **A** Likely.

5 **Q** Okay. And while we're here, you see at the bottom screen
6 -- no, in the middle, you see "Tencent"? Do you see that?

7 **A** Yes.

8 **Q** Who is Tencent?

9 **A** A large technology company in China.

10 **Q** Okay. And looking at the notes there, did they at that
11 time own 4.9 percent of Tesla?

12 **A** I believe so, yes.

13 **Q** Okay. And that was the same amount that you understood
14 the Saudi PIF, approximately, owned at this time?

15 **A** Yes.

16 **Q** Okay. Do you know if Mr. Musk was ever -- ever told you
17 that he thought Tencent might be -- itself, might be wanting to
18 take Tesla private?

19 **A** I don't recall.

20 **Q** Okay.

21 **MR. PORRITT:** If we can go back to Exhibit 194.

22 (Document displayed)

23 **BY MR. PORRITT**

24 **Q** You'll see there, the second point from the bottom it
25 says:

1 "Goldman and Silver Lake will make the calls.

2 Not Elon."

3 Do you see that?

4 **A** Yes.

5 **Q** Do you know why you and Goldman -- or Silver Lake, rather,
6 not you personally -- Silver Lake and Goldman were tasked to
7 make the calls, rather than Elon?

8 **MR. PRICE:** Well, objection. This assumes facts, as
9 phrased. Had to.

10 **THE COURT:** Why don't you rephrase that.

11 **MR. PORRITT:** Okay.

12 **BY MR. PORRITT**

13 **Q** You wrote here in your email:

14 "Goldman and Silver Lake will make the calls.

15 Not Elon."

16 Do you see that?

17 **A** Yes.

18 **Q** Was that a decision that was made as part of the approval
19 from the special committee, for you to make these calls?

20 **A** I don't recall.

21 **Q** Okay. Do you know -- do you know why Elon Musk was not
22 going to make the calls to these investors?

23 **MR. PRICE:** Objection. Foundation.

24 **THE COURT:** Overruled.

25 **THE WITNESS:** I don't recall.

1 **BY MR. PORRITT**

2 **Q** If I can refer you --

3 **MR. PORRITT:** If you could show to the jury -- to the
4 jury. To the witness, Exhibit 196, please.

5 (Document displayed to the Witness)

6 **BY MR. PORRITT**

7 **Q** This is an email from Steve Rosenblum to Sam Britton at
8 Goldman Sachs and you and others, do you see that?

9 **A** Yes.

10 **MR. PORRITT:** At this point, we move to admit Exhibit
11 196, Your Honor.

12 **MR. PRICE:** No objection, Your Honor.

13 **THE COURT:** Admitted. You may publish.

14 (Trial Exhibit 196 received in evidence.)

15 (Document displayed)

16 **BY MR. PORRITT**

17 **Q** And you'll see, starting at the bottom of Exhibit 196, the
18 first page it has the "Talking points/message"? Do you see
19 that?

20 **A** Yes. I'm sorry, yes.

21 **Q** And then it continues on to the second page of Exhibit
22 196?

23 **MR. PORRITT:** Derek, if you could scroll down.

24 **THE WITNESS:** Yes.

25 **MR. PORRITT:** Derek, can you have the talking points

1 on one page, blown up so we can see them?

2 (Document displayed to the Witness)

3 **MR. PORRITT:** And also on the second page?

4 (Document displayed)

5 **MR. PORRITT:** There we go. That's it.

6 **BY MR. PORRITT**

7 **Q** So these were the talking points that you agreed with the
8 special committee, in reaching out to potential investors?

9 **A** Yes.

10 **Q** And one of them is: We're calling to get a sense as to
11 the seriousness of your interest."

12 Is that correct?

13 **A** Yes.

14 **Q** And you are getting back to them with respect to your
15 potential interest in taking Tesla private?

16 **A** Yes.

17 **Q** And these were the talking points also used with the Saudi
18 PIF; is that correct?

19 **A** Yes.

20 **Q** Okay. And you developed these talking points after you'd
21 had your conversation with Mr. Musk on August 15th. Isn't that
22 correct?

23 **A** Yes.

24 **Q** Okay. Now, do you recall that on August 16th or the
25 evening of August 16th, the *New York Times* published a lengthy

1 article based on an interview with Elon Musk?

2 **A** Yes.

3 **Q** Okay.

4 **MR. PORRITT:** At this point, if I could show the
5 witness Exhibit 182.

6 **THE COURT:** Okay.

7 (Document displayed to the Witness)

8 **BY MR. PORRITT**

9 **Q** Do you recognize this exhibit as also containing text
10 messages?

11 **A** Yes.

12 **Q** From you?

13 **MR. PORRITT:** At this point we'd move the admission of
14 Exhibit 182, Your Honor.

15 **MR. PRICE:** No objection.

16 **THE COURT:** Admitted.

17 (Trial Exhibit 182 received in evidence.)

18 **MR. PORRITT:** And then, Derek, if you could publish to
19 the jury Exhibit 182-5.

20 (Document displayed)

21 **MR. PORRITT:** And then if I can direct the witness to
22 Record No. 3362.

23 (Document enlarged)

24 **BY MR. PORRITT**

25 **Q** So you see this is a text message from Gregg Lemkau to you

1 and Dan Dees? Is that correct?

2 **A** Yes.

3 **Q** And who's Mr. Lemkau?

4 **A** He is -- at the time was the head of M&A, I think, at
5 Goldman Sachs, was his title. He was a Goldman Sachs
6 executive.

7 **Q** And Mr. Lemkau writes (As read) :

8 "Elon gave hour-long interview to *New York*
9 *Times* today. Nothing particularly bad but so
10 much for laying low."

11 Do you see that?

12 **A** Yes.

13 **Q** At this time were you and Goldman Sachs hoping that Elon
14 Musk would lay low while you did the work on the going-private
15 transaction?

16 **A** Yes.

17 **MR. PORRITT:** And if I could just show the witness
18 Exhibit 171, which I think is in evidence -- it is in evidence.

19 (Document displayed)

20 **BY MR. PORRITT**

21 **Q** Do you see, is this the article that Mr. Lemkau was
22 referring to? Do you recall?

23 **A** Yes.

24 **MR. PORRITT:** If we can go back to Exhibit 182-5.

25

1 BY MR. PORRITT

2 Q Do you recall reading this article?

3 A Yes, I definitely read it, multiple times.

4 Q Okay. Do you recall what your reaction was to it when you
5 read it?

6 MR. PRICE: Objection, relevance.

7 THE COURT: Overruled.

8 THE WITNESS: The only thing I recall is that he said
9 he wouldn't talk to the press anymore after we met, and he
10 talked to the press the next day.

11 MR. PORRITT: If we could go back to Exhibit 182-5.

12 (Document displayed)

13 MR. PORRITT: And if we can go to Record 3368.

14 (Document displayed)

15 BY MR. PORRITT

16 Q So this is a text from Elon Musk to you and Dan Dees. Do
17 you see that?

18 A Yes.

19 Q (As read)

20 "We had a nuke inbound from one of the major
21 shorts via *New York Times*."

22 Do you see that?

23 A Yes.

24 Q Do you recall what Mr. Musk was referring to there?

25 A I don't.

1 **Q** Okay.

2 **A** I don't recall.

3 **MR. PORRITT:** If we can go down to Record 3374.

4 (Document displayed)

5 **BY MR. PORRITT**

6 **Q** This is another text from Elon Musk to you:

7 "The article started out extremely bad (nuke
8 level) and got turned around with massive
9 effort."

10 Do you see that?

11 **A** Yes.

12 **Q** Does that refresh your recollection as to how Mr. Musk was
13 interacting with the *New York Times* with that article?

14 **A** Yes. I mean, I vaguely recall at this time, because he
15 put this tweet out and there was a lot of sort of market
16 speculation, I guess, about whether the company would go
17 private. And with the short position out, he was under, based
18 on this set of the text exchanges, the pressure I guess from
19 shorts' speculation to the *New York Times* that a deal wouldn't
20 be consummated.

21 **Q** So if I can now refer you to -- well, do you recall
22 attending a board meeting with Tesla on August 23, 2018?

23 **A** Yes.

24 **Q** Okay. And you attended with Goldman Sachs, is that
25 correct?

1 **A** Yes.

2 **Q** Okay. And did you make a presentation to the board?

3 **A** Together with Goldman Sachs, yes.

4 **Q** Okay.

5 **MR. PORRITT:** If I could show the witness Exhibit 201.

6 **THE COURT:** Okay.

7 (Document displayed to the Witness)

8 **BY MR. PORRITT**

9 **Q** Okay, so if I can show you Exhibit -- do you recognize
10 Exhibit 201?

11 **A** Yes.

12 **Q** Okay. And is this the presentation that you and Goldman
13 Sachs made to the board on August 23rd, 2018?

14 **MR. PORRITT:** If you could scroll through it, Derek,
15 to let them --

16 (Document displayed)

17 **THE WITNESS:** Yes. I believe so.

18 **MR. PORRITT:** Okay. At this point we would move the
19 admission of Exhibit 201, Your Honor.

20 **MR. PRICE:** No objection.

21 **THE COURT:** Admitted. You may publish.

22 (Trial Exhibit 201 received in evidence.)

23 (Document displayed)

24 **BY MR. PORRITT**

25 **Q** And so to the board, you and Goldman discussed the

1 availability of funding for a going-private transaction, is
2 that correct?

3 **A** Yes.

4 **Q** Okay. At this point in time, again, did you have any
5 committed financing for any going-private transaction?

6 **A** No.

7 **Q** Okay.

8 **MR. PORRITT:** If we could turn to Page 58 of Exhibit
9 201.

10 (Document displayed)

11 **BY MR. PORRITT**

12 **Q** This is illustrative sources and uses, do you see that?

13 **A** Yes.

14 **Q** And at the top it says:

15 "Take private of Titanium..."

16 Titanium is the code word for Titanium?

17 **A** Yes.

18 **Q** And then at just asterisk per share would require an
19 asterisk billion of committed capital, do you see that that?

20 **A** Yes.

21 **Q** Does that reflect that the full price for taking Tesla
22 private had not yet been decided as of August 23, 2018?

23 **A** Yes.

24 **Q** And the amount of capital needed was not decided as of
25 August 23rd?

A Yes.

Q And following the August 23rd meeting it was decided not to go forward with the going-private transaction?

A Yes.

Q Okay. In your work for the Tesla go-private, the structure that a private Tesla would adopt was never finalized. Is that correct?

A Yes.

Q Okay. And you never finalized the total amount of capital needed to take Tesla private?

A Yes.

Q And the price was never finalized?

A Yes.

Q Okay. You never determined the percentage of shareholders who would roll into a private Tesla?

A Yes.

Q No formal proposal was ever made to the Tesla board of directors to take it private, correct?

A Not that we were part of.

MR. PORRITT: Thank you, Mr. Durban.

THE WITNESS: Thank you.

MR. PORRITT: Wait, you have questions from our colleague on the defense side and reserve the right for redirect.

THE COURT: Thank you. Mr. Price.

1 **CROSS-EXAMINATION**

2 **BY MR. PRICE**

3 **Q** Good morning, Mr. Durban. My name is Bill Price, I'm with
4 Quinn Emanuel. And we're doing a choreography here where I'm
5 going to try to make sure you have in front of you the exhibits
6 I am going to use, largely the same. And I want to make sure
7 that you have your deposition transcripts in front of you just
8 in case you need to refer to them.

9 **MR. PRICE:** May I approach?

10 **THE COURT:** You may approach.

11 (Document tendered)

12 **THE WITNESS:** Thank you.

13 **MR. PRICE:** And for the Court.

14 (Document handed up to the Court)

15 **THE COURT:** Thank you.

16 **BY MR. PRICE**

17 **Q** So Mr. Durban, you actually appeared before the Tesla
18 board of directors at a meeting on August 23rd, 2018. Right?

19 **A** Yes.

20 **Q** And let me show you the minutes, which is Exhibit 101 in
21 the binder that you were just given. I'll put it on the
22 screen, the front page.

23 (Document displayed to the Witness)

24 **Q** You actually at some point looked at these minutes and
25 particularly the section that talks about availability of

1 financing for a potential going-private transaction and
2 determined that it accurately reflected what you said to the
3 board that day. Correct?

4 **A** Yes, I believe so.

5 **Q** And when I say "you," let me step back. Both you and
6 Mr. Dees were present at the board. Correct?

7 **A** Yes.

8 **Q** And Mr. Dees is someone you had worked with before,
9 working on this particular project?

10 **A** Yes.

11 **Q** He was the co-head of investment banking at Goldman Sachs?

12 **A** I don't know if that was his title at the time. He may
13 have been company-head of the technology group and was then
14 subsequently promoted to company-head of investment banking.

15 **Q** He's actually going to be here so we can find out.

16 **A** You can clarify.

17 **Q** And you had found him to be -- well first of all, Goldman
18 Sachs is probably the leading investment banking firm in the
19 coun- -- in the world?

20 **A** One of two or three, yes.

21 **Q** And in your dealings with Mr. Dees he had always been
22 professional, thorough and honest, correct?

23 **A** Yes.

24 **Q** And at this board of directors meeting, you were going to
25 make some representations to the board about -- about -- let me

1 get the exact word -- the availability of financing for a
2 potential transaction, correct?

3 **A** Yes.

4 **Q** And of course your intent was to be honest and truthful,
5 correct?

6 **A** Yes.

7 **Q** And you knew that the board would rely, might rely, at
8 least, on what you and Mr. Dees were telling them. Right?

9 **A** Yes.

10 **Q** You were introduced to the board as Mr. Musk's financial
11 advisers. Is that right?

12 **A** Yes.

13 **Q** And if we can go to Page 3 of 101 there's a paragraph that
14 I've got in front of you here.

15 (Document displayed)

16 **Q** I want to call your attention to the second sentence

17 (As read) :

18 "The financial advisers emphasized to the
19 board that although their work was
20 preliminary, the funding was available from a
21 variety of sources. The Goldman Sachs and
22 Silver Lake representatives indicated that
23 they had substantial experience with these
24 types of transactions, and while taking Tesla
25 private would be unique, there was more than

1 enough interest and funding to execute on
2 such a transaction."

3 That's what you told the board on August 23rd, correct?

4 **A** Yes.

5 **Q** And you started your work on this on a Monday, August 6th.
6 Right?

7 **A** Yes.

8 **Q** So this is 17 days later. Right?

9 **A** Yes.

10 **Q** And then, you look at the second paragraph, we have got it
11 highlighted there. After mentioning possible sources, it says
12 (As read) :

13 "The financial advisors discussed how much
14 they believed each of these sources would
15 fund and further indicated that raising the
16 funds to pursue Mr. Musk's proposal to take
17 the company private was very doable."

18 That's what you represented to the board on August 23rd,
19 correct?

20 **A** Yes.

21 **Q** Now you also joined Mr. Musk in making recommendations on
22 whether or not the board should actually consider a go-private,
23 right?

24 **A** Yes.

25 **Q** And the recommendation was that the board should not, as a

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1 result of the advisers and Mr. Musk learning that both large
2 institutions and small investors prefer the company to stay
3 public. Correct?

4 **A** Yes, as one of the reasons.

5 **Q** Okay. Now one of the reasons was not financing, right?
6 You didn't say to the board: You shouldn't go forward because
7 you can't get financing for this deal. You didn't say that,
8 did you?

9 **A** No, I did not say that.

10 **Q** That was not one of the reasons why this transaction did
11 not go forward. Correct?

12 **A** Agreed.

13 **Q** Let me take you back through this 17-day experience. We
14 talked about the call on August 6th. It was your understanding
15 Mr. Musk was going to call you because you had heard that he
16 had been talking to a mutual acquaintance about his desire to
17 go private, right?

18 **A** Yes.

19 **Q** And that person said you'd be a person to call --

20 (Reporter clarification)

21 **BY MR. PRICE**

22 **Q** And that person had said you would be a person to call in
23 connection with that. Correct?

24 **A** Yes.

25 **Q** And that's because you had the experience with the Dell,

1 the Dell transaction. Correct?

2 **A** Amongst others. He's also the person -- our mutual
3 acquaintance is one of our CEOs for one of our portfolio
4 companies who I'm on the board of.

5 **Q** And at the time, Silver Lake, your company, was known to
6 be investors as well as providers of capital for transactions
7 like the going private that Mr. Musk was considering, correct?

8 **A** Yes.

9 **MR. PORRITT:** Objection, leading.

10 **THE COURT:** Overruled.

11 **MR. PRICE:** I'm allowed to.

12 **THE WITNESS:** Sorry, yes.

13 **BY MR. PRICE**

14 **Q** When you got the call from Mr. Musk, your assumption is
15 that the reason he was calling you was to get funds from
16 Silver Lake. Correct?

17 **A** Yes.

18 **Q** And, and through that entire August 6th call, to your
19 surprise, he didn't ask for funds from Silver Lake. Correct?

20 **A** Yes.

21 **Q** So you mentioned that you took notes. And we've seen
22 these, it's Exhibit 175. Let me just go ahead and put that up.

23 (Document displayed)

24 **Q** And we kind of have bullet points here of discussion,
25 topics of discussion and you've talked about some of these, for

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1 example, "Public painful." It talks about "Overhead manage,
2 70/80 percent of corporate governance." That referred to how
3 much effort he was having to spend of his time because the
4 company was a public company. Right?

5 **A** Yes.

6 **Q** You talked about shorts. And by the way, shorts are these
7 investors who are basically betting on the company failing. If
8 the company fails, does poorly, these investors do well.

9 Correct?

10 **A** Yes.

11 **Q** Also, I hear you, you see it says "20 percent premium" so
12 on August 6th Mr. Musk had talked to you about a going-private
13 where there would be a 20 percent premium over the existing
14 stock price. Correct?

15 **A** Yes.

16 **Q** And at that time, a 20 percent premium over the existing
17 stock price would have been about \$420, correct?

18 **A** Correct.

19 **Q** And he talked about no change of control, and you see next
20 to "No change of control" here it says "Vast majority buy them
21 out." And in the vast majority of taking private cases, you
22 are trying to buy out all the shareholders. Correct?

23 **A** Yes.

24 **Q** That's what Mr. Dell did, correct?

25 **A** Yes.

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1 **Q** That was the standard kind of structure for a
2 going-private.

3 **A** Yes.

4 **Q** And on the right-hand side, you see, three down, he talks
5 about encouraging investors to stay investors. That was one of
6 his goals, right?

7 **A** Yes.

8 **Q** And I think Mr. Porritt called your attention to
9 "Shareholder account below 300." One thing Mr. Musk talked
10 about was you could use a special purpose vehicle as an
11 investor that would contain a lot of shareholders. Correct?

12 **A** Yes.

13 **Q** And that was, that was one way to make this work even
14 though there is a limit on shareholders (Indicating quotation
15 marks) of 300. Right?

16 **A** Yes.

17 **Q** Because that special purpose vehicle would count as only
18 one shareholder. Right?

19 **A** Yes.

20 **Q** Now, this wasn't -- you didn't know about this at the
21 time, this isn't something you had looked into before.
22 Correct?

23 **A** Correct.

24 **Q** And if we go down further it says "Major investors to
25 remain investors." In connection with that, isn't it correct

1 that what Mr. Musk told you was that he had major investors in
2 his private company, SpaceX, and he expected that they would
3 want to remain investors in a private company, Tesla.

4 **A** I don't recall SpaceX.

5 **Q** Okay. Well, let me see if I can refresh your
6 recollection?

7 **A** Yes, please.

8 **Q** If you can look in front of you there's at a deposition
9 dated September 12, 2018.

10 (Document displayed to the Witness)

11 **Q** And I'm going to ask you to look at Page 88.

12 (Witness complies with request)

13 **Q** Looking at 88, Line 11.

14 **A** Sorry --

15 **Q** Actually, 88, Line 22 to 89, Line 1, if you can read that
16 to yourself and not out loud. Just raise your hand when you've
17 completed that. And you see the question that prompted that
18 was at 88, Line 11 to 14. Do you see that?

19 **A** Yes.

20 **Q** Okay. So does that refresh your recollection then, in
21 connection with this note, "Major investors to remain
22 investors," that he mentioned he already had investors in
23 SpaceX, and that part of the conversation was him juxtaposing
24 how much he enjoyed the SpaceX governance relative to this
25 experience with Tesla.

DURBAN - CROSS / PRICE

1 **A** Yes.

2 **Q** And that those investors he thought would be among the
3 major investors that would want to remain investors in Tesla?

4 **A** Correct.

5 **MR. PRICE:** I'll slow down, I'm sorry.

6 **BY MR. PRICE**

7 **Q** And here it says meeting August 10th, so August 6 was a
8 Monday, August 10th is a Friday. That was a surprise to you
9 that he wanted to meet so quickly. Right?

10 **A** Yes.

11 **Q** You had hoped to meet -- like, around August 22nd, right?

12 **A** Yes.

13 **Q** And he said no, he was in a much more rapid timeline than
14 that. Right?

15 **A** Yes.

16 **Q** This is what you came to refer to as "Elon time"?

17 **A** Yes.

18 **Q** And let me ask you in general about what happened in the
19 next few, 17 days or so. You mentioned that this structure of
20 letting investors -- shareholders remain shareholders was
21 something that was unique and unprecedented. Right?

22 **A** Yes.

23 **Q** And as was pointed out in one of the texts, Silver Lake
24 actually had looked at whether or not that was a structure that
25 was doable, even though it was unique and unprecedented.

1 Right?

2 **A** Yes.

3 **Q** And the conclusion, after looking at that, was that
4 mechanically this concept actually worked. Right?

5 **A** Yes.

6 **Q** And this was kind of an illustration, your observation was
7 that Mr. Musk's mind was set to do things differently and sort
8 of reimagine the process. Right?

9 **A** Yes.

10 **Q** And you didn't always have a frame of reference for that.

11 **A** Yes.

12 **Q** Turned out his frame of reference was doable and worked,
13 right?

14 **A** Yes.

15 **Q** So we talked about you meeting on August 6th. Let me go
16 now to August 7th and that's when some tweets came out. Right?

17 **A** Yes.

18 **Q** And now, before the tweets came out, I want to call your
19 attention to your texts at Exhibit 174-3. And these texts are
20 in UTC time so we are going to subtract seven hours from the
21 time here.

22 And so this is at August 7, 12:50, that would actually be
23 5:50 a.m., right?

24 **A** Yes.

25 **Q** Pacific. And here you have got:

1 "He rolls. We put up 7-10 billion."

2 That's referring to what you said in direct that in
3 internal discussions before these tweets even came out, at
4 Silver Lake you were talking about Silver Lake investing 7 to
5 10 billion, correct?

6 **A** Silver Lake and affiliates, yes.

7 **Q** And one of the biggest investments Silver Lake would have
8 ever made. Correct?

9 **A** Correct.

10 **Q** Now, the tweets came out, and you've told us that you were
11 surprised, right?

12 **A** Yes.

13 **Q** Now, the number 420, let's show the Exhibit 8, which is
14 one of the tweets very quickly.

15 (Document displayed)

16 **Q** "Am considering taking Tesla private at \$420. Funding
17 secured."

18 Now, the 420 didn't surprise you because you had had the
19 conversation with him the night before about 20 percent
20 premium. Right?

21 **A** Yes.

22 **Q** And with respect it to the phrase "Funding secured," you
23 didn't know what that phrase meant when you read it, correct?

24 **A** Correct.

25 **Q** And in fact, you said you had never seen that term before.

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1 Correct?

2 **A** Yeah. The words I used is it's not a term of art in our
3 industry.

4 **Q** It's not a term of art that you are used to dealing with,
5 right?

6 **A** Yes.

7 **Q** But one of the things that surprised you was that you had
8 never seen, with respect to the first sentence, "Am considering
9 taking Tesla private at \$420," you had never seen that level
10 of transparency before. Right you?

11 **A** Correct.

12 **Q** In fact, your view when looking at that was you considered
13 it to be, that, the most disclosive thing you've ever seen.
14 Right?

15 **A** Yes, I stated that.

16 **Q** And this is an example, again, of Mr. Musk doing things
17 differently and sort of reimagining the process.

18 **A** Correct.

19 **Q** So, having seen the tweet coming out, being surprised, you
20 have -- you started working to prepare for this meeting on
21 August 10th. Right?

22 **A** Yes.

23 **Q** Now, before the meeting, you had a text, I want to show
24 you. It's 174-17.

25 (Document displayed)

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1 **Q** And you're texting to Mr. Bingle, who is a managing
2 director at Silver Lake?

3 **A** Managing partner.

4 **Q** Managing partner, okay.

5 "My gut is he has and/or can raise the money
6 (maybe easily) after reading everything and
7 preparing."

8 When you say "After reading everything and preparing," to
9 get this feeling he might be able to raise the money easily?

10 **A** Yes.

11 **Q** What preparing and reading were you referring to?

12 **A** Reviewing public information, researching reports, looking
13 at financial models.

14 **Q** Then next text you say:

15 "Premise would be better risk reward than
16 Uber a year ago (or even SoftBank VM deal
17 with real IP developed. A lot of long
18 investors have made a lot of money with
19 him.....in many companies."

20 Correct?

21 **A** Correct.

22 **Q** And that was part of the reason that your gut was that he
23 could raise that money maybe easily, his track record with his
24 investors. Correct?

25 **A** Yes.

Q Okay. So let me focus now about after the meeting. And if we look at these notes at Page 174-18.

(Document displayed)

Q And you see there is an entry 2093 and the time here would be, I guess, 12:12 p.m. because we are subtracting the seven hours. And you see the paragraph says.

"Offered to help him personally pull the deal together..."

Do you see that that?

A Yes.

Q He had earned that right. And it says in the parenthetical:

"And the inbounds with lots of money being thrown his way including three during our meeting which lasted 1 hour and 40." Do.

You see that?

A Yes.

Q So during this call there were inbound communications to Mr. Musk with people, in your words, throwing money his way. Right?

A Yes.

Q And then we go on to the other paragraph that's highlighted:

"He asked what's in it for us. Said no fee
and not paid by the hour. Told him was

1 unsure/not informed enough to form a judgment
2 about the investment materials/risks (sic)
3 especially given various structures, but he
4 didn't need our money per se."

5 That's what you told him at the time, correct?

6 **A** Correct.

7 **Q** So that's after the meeting. And then a little later, I'm
8 going to ask you to look at 182 which is another group of your
9 texts, I'm going to put up Page 9.

10 (Document displayed)

11 **Q** And call your attention to a text which is, if we do the
12 math right, I think goes about 6:22 p.m., actually, on the
13 10th, if you do that subtraction. I know this is again in UTC
14 time.

15 And if you look at that, you say:

16 "Our largest investor..."

17 And we've blacked that out at the request of Silver Lake.

18 "Our largest investor..."

19 This is a text you're sending to Mr. Musk, correct?

20 **A** Yes.

21 **Q** And you say:

22 "Our largest investor..."

23 And although we blacked out the name, this is an investor
24 that had assets under management in the hundreds of billions.

25 Right?

DURBAN - CROSS / PRICE

1 **A** Yes.

2 **Q** I mean, as large or larger than the PIF. Correct?

3 **A** Yes.

4 **Q** At the time. And so this investor had reached out to you,
5 Silver Lake, proactively, without request. And you told
6 Mr. Musk that at this time, you said nothing. Right?

7 **A** Yes.

8 **Q** What you also told Mr. Musk at this was "This can be
9 done."

10 Right?

11 **A** Yes.

12 **Q** And that was your belief as early as the end of the day on
13 August 10th of 2016. Correct?

14 **A** Yes.

15 **Q** So, we go forward now and -- actually, let me skip a lot
16 of the detail here and talk to you about a call you had on
17 August 22nd with Yasir. And I forgot his last name. Do you
18 remember, last name?

19 **A** I don't know what you're talking about.

20 **Q** Okay. We have called him Yasir. And that's easier.

21 **A** I think it's "Yasser."

22 **Q** "Yasser." Thank you. And after your call with Yasir on
23 the 26th, your -- the way --

24 **A** 22nd.

25 **Q** August 22nd, I'm sorry, right, on August 22nd, Yasir had,

DURBAN - REDIRECT / PORRITT

1 you say, expressed his deep interest in being involved in
2 connection with this going-private transaction. Correct?

3 **A** Yes.

4 **Q** And you and he talked about Yasir saying that he would
5 like Tesla to open up a factory in Saudi Arabia. Correct?

6 **A** Yes.

7 **Q** But that was not -- his deep interest in -- in investing
8 in this transaction was not conditioned on opening the factory
9 in Saudi Arabia. Correct?

10 **A** Correct.

11 **Q** In fact, he said that he would want that done only if it
12 were economically viable to Tesla. Correct?

13 **A** Correct.

14 **MR. PRICE:** Your Honor, just one second?

15 **THE COURT:** Yep.

16 **MR. PRICE:** Thank you, Mr. Durban. No further
17 questions.

18 **THE COURT:** All right. Thank you.

19 Redirect?

20 REDIRECT EXAMINATION

21 **BY MR. PORRITT**

22 **Q** Thank you, Mr. Durban. I promise I'll be brief.

23 If we could -- Mr. Price showed you Exhibit 101, the board
24 minutes from August 23rd, particularly Page 3.

25 **MR. PORRITT:** If we could pull those up.

DURBAN - REDIRECT / PORRITT

1 (Document displayed)

2 **MR. PORRITT:** And again, if we could go to the page
3 describing Mr. Durban's presentation to the board.

4 **BY MR. PORRITT**

5 **Q** I think the minutes described your work as -- as based on
6 your preliminary -- they were preliminary discussions with
7 various equity sources.

8 And you emphasized to the board that your work was
9 preliminary, is that correct?

10 **A** Yes.

11 **Q** And that is a fair description of how you described where
12 your work was as of August 23rd?

13 **A** Yes.

14 **Q** Okay ands then, you go back, the next paragraph down, you
15 describe the task of raising the funds to pursue Mr. Musk's
16 proposal and loss to take the company private was, quote, "Very
17 doable." Do you see that?

18 **A** Yes.

19 **Q** And we've had some discussion of terms of art. Is "Very
20 doable" a financial term of art?

21 **A** No.

22 **Q** Okay. As of August 23rd, as I think you told me on
23 direct, the amount of capital needed for the taking-private
24 transaction was still unknown. Correct?

25 **A** Correct.

DURBAN - REDIRECT / PORRITT

1 **Q** And the price that you would take Tesla was still
2 undetermined, correct?

3 **A** Yes.

4 **Q** And the potential role of shareholders was still unknown.
5 Correct?

6 **A** Yes.

7 **Q** And the structure was still uncertain. Correct?

8 **A** Yes.

9 **Q** Okay. And Mr. Price talked to you a little bit about the
10 legal structure, using an SPV, trying to include small
11 investors, et cetera. Did you ever reach any final conclusion
12 about whether that was viable or not?

13 **A** No.

14 **Q** Okay. So it wasn't ruled in, it wasn't ruled out by
15 August 23rd?

16 **A** Correct.

17 **Q** Okay. So as of August 23rd, there was still substantial
18 uncertainties as to whether a going-private transaction could
19 proceed? Is that fair to say?

20 **MR. PRICE:** Objection, vague, leading.

21 **THE COURT:** Overruled.

22 **THE WITNESS:** Yes.

23 **BY MR. PORRITT**

24 **Q** Okay. And Mr. Price asked you about you received some
25 indications of interest from some investors, including one of

DURBAN - REDIRECT / PORRITT

1 the investors from Silver Lake in the going-private transaction
2 in Tesla? Is that correct?

3 (Reporter clarification)

4 **MR. PORRITT:** Sorry.

5 **BY MR. PORRITT**

6 **Q** Mr. Price asked you how you'd received some indications of
7 interest from potential investors in the going-private for
8 Tesla, is that correct?

9 **A** Why.

10 **Q** Including one of your own investors?

11 **A** Yes.

12 **Q** Okay. Is an indication of interest expressed that way the
13 same as a commitment to financing?

14 **A** No.

15 **Q** Okay. What's the difference?

16 **A** Um, an interest is an expression of interest. A
17 commitment is a signed legal document committing you to wire
18 money.

19 **Q** Okay. And I think we saw in your presentation to Mr. Musk
20 as early as August 10th that you wanted such a written
21 committed financing before making any proposal to the board.

22 Is that correct?

23 **A** Yes.

24 **Q** And that was Stage 1 of the going-private timeline,
25 correct?

DURBAN - RECROSS / PRICE

1 **A** Yes.

2 **Q** And you never got to that stage with going private for
3 Tesla.

4 **A** No. Not -- not I.

5 **MR. PORRITT:** Thank you, Mr. Durban.

6 **THE COURT:** Thank you. All right. Anything on
7 recross?

8 **RECROSS-EXAMINATION**

9 **BY MR. PRICE**

10 **Q** Mr. Durban, just to be clear, you just said that in
11 connection with financing, there was no signed legal document
12 with someone committing to financing. Do you recall saying
13 that?

14 **A** Yes.

15 **Q** Despite that, you told the board that based upon your
16 substantial experience, there was more than enough interest and
17 funding to execute on the transaction. Right?

18 **A** Yes.

19 **Q** So what you gave them was based on your experience, right,
20 that funding was not going to be an issue. Right?

21 **A** Yes.

22 **Q** And you said that we didn't -- you didn't go to Stage 1.
23 One of the reasons this did not progress beyond August 23rd or
24 go to what you have referred to as a Stage 1, is the feedback
25 that the shareholders wanted Tesla to stay public. Right?

PROCEEDINGS

1 **A** Correct.

2 **Q** And that's what you told the board.

3 **A** Correct.

4 **MR. PRICE:** Thank you.

5 **THE COURT:** Anything further?

6 **MR. PORRITT:** Nothing further, Your Honor.

7 **THE COURT:** All right. Thank you, Mr. Durban. You
8 may step down, and you are excused.

9 **THE WITNESS:** Yes, sir. Have a nice weekend.

10 **THE COURT:** Thank you.

11 (Witness excused)

12 **THE COURT:** The plaintiff may call the next witness.

13 **MR. PORRITT:** I don't know, we started late,
14 Your Honor, so I don't know what time you had in mind for --

15 **THE COURT:** Well, okay. That is a fair point. So I
16 guess we have been going, I don't know, an hour and a half, so
17 why don't we go ahead and take our break. We will take a
18 20-minute break.

19 Again, just a reminder, please do not discuss this case
20 with anyone, including amongst yourselves; do not read or
21 listen to any reportage or anything about this case. Do not do
22 any research or form any opinions until this case is submitted
23 to you for deliberation. See you in 20 minutes.

24 **THE COURTROOM DEPUTY:** All rise for the jury.

25 (Jury excused)

PROCEEDINGS

1 (The following proceedings were held outside of the
2 presence of the Jury)

3 **THE COURT:** All right. So, you will have to get me
4 the allocation of those four extra minutes on the Brinkman.
5 How do you want to handle that?

6 **MR. PORRITT:** I'm sorry, Your Honor?

7 **THE COURT:** I said that our time estimate for the
8 Brinkman depo, there's five more minutes that we have, and I
9 need to allocate that --

10 **MR. PORRITT:** I think the difference may be we have --
11 yesterday, again, in meeting and conferring, we tried to cut
12 some more time out of Mr. Brinkman so we will make sure the
13 Court has the current -- I thought we submitted that. So we'll
14 check.

15 **THE COURTROOM DEPUTY:** You did, but you have 44
16 minutes. I have 50.

17 (Off-the-Record discussion between counsel)

18 **MR. PORRITT:** All right. Then, yes, we'll work out
19 what the proper allocation should be and we will figure that
20 out.

21 **THE COURT:** Thank you.

22 (Recess taken from 10:37 a.m. to 11:00 a.m.)

23 (The following proceedings were held outside of the
24 presence of the Jury)

25 **THE COURT:** All right, ready to retrieve the jury?

THE COURTROOM DEPUTY: I am. Court is reconvened.

(Jury enters the courtroom at 11:03 a.m.)

THE COURT: All right. Welcome back. Have a seat, everyone.

DAN DEES,

called as a witness for the Plaintiffs, having been duly sworn,
testified as follows:

THE WITNESS: I do.

THE CLERK: Please have a seat.

Please speak clearly into the microphone. State and spell your first and last name for the record.

THE WITNESS: Dan Dees.

THE COURT: All right. And just for the record, this is the plaintiffs next witness that you're calling, Mr. Dees?

MR. PORRITT: That's correct, Your Honor.

THE COURT: All right. Mr. Dees, if you could spell your last name for the record, I'd appreciate it.

THE WITNESS: D-E-E-S.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. PORRITT

Q. Good morning, Mr. Dees.

A. How are you?

Q. I'm very well. Thank you.

Could you please state your current job position?

DEES - DIRECT / PORRITT

1 **A.** I'm the co-head of global banking and markets at Goldman
2 Sachs.

3 **Q.** And how long have you been at Goldman Sachs?

4 **A.** 30 years, 30 and a half.

5 **Q.** Wow. And do you recall when you first started working
6 for -- doing work with Tesla, Inc.?

7 **A.** The 2014-'15 time frame.

8 **Q.** Okay. And are you the Goldman Sachs representative with
9 the primary client relationship with Elon Musk and Tesla?

10 **A.** I'm the team lead with Elon Musk, yes.

11 **Q.** Okay. And Goldman Sachs has done a substantial amount of
12 business with Tesla over the last eight years?

13 **A.** Yes.

14 **Q.** Okay. And what was your job position back in 2018 when
15 the events in question in this case occurred?

16 **A.** In 2018 I was the head of technology, media and telecom,
17 which was a -- which is an industry group within investment
18 banking.

19 **Q.** Okay. Now, I'm going to get -- we'll get straight to the
20 chase. I will refer you first to Exhibit 8, previously
21 admitted.

22 (Document displayed.)

23 **Q.** It's the tweet we're becoming very familiar with over the
24 last couple of weeks (as read) :

25 "Am considering taking Tesla private at \$420. Funding

DEES - DIRECT / PORRITT

1 secured."

2 Do you recognize this tweet?

3 **A.** I do.

4 **Q.** Okay. Do you recall when you first saw this tweet?

5 **A.** I don't.

6 **Q.** Okay. Do you recall if you saw it shortly after it was
7 posted?

8 **A.** I do.

9 **Q.** Okay. Do you follow Elon Musk on Twitter?

10 **A.** I do.

11 **Q.** Okay. Did you follow him back in August 2018?

12 **A.** I did.

13 **Q.** Okay. And do you recall what your reaction was when you
14 saw this tweet?

15 **A.** I was -- I was surprised.

16 **Q.** Okay. And why were you surprised?

17 **A.** Surprised he was considering taking it private, surprised
18 that we weren't involved at Goldman.

19 **Q.** So you would have expected that before Mr. Musk announced
20 something like "taking Tesla private," that he would have
21 consulted his financial -- one of his many financial advisors?

22 **A.** Not necessarily. I wouldn't have expected it. I would
23 have hoped.

24 **Q.** And do you recall what you then did after seeing this
25 tweet?

DEES - DIRECT / PORRITT

1 **A.** I don't.

2 **Q.** Did you attempt to contact Mr. Musk?

3 **A.** I did at some point, yes.

4 **Q.** Okay. Do you recall, was that by email or by telephone?

5 Both?

6 **A.** I -- I suspect by email. I think by email.

7 **Q.** Okay. Do you recall whether you -- whether you had a
8 chance to speak with Mr. Musk?

9 **A.** Eventually, yes.

10 **Q.** Okay. And you had a -- you had a meeting with him on
11 August 10th; is that correct?

12 **A.** We had a subsequent meeting. I don't know the exact date
13 of it.

14 **Q.** Okay. And I'll try and frame it for you. August 7th was
15 a Tuesday. August 10th would be the Friday.

16 Does that refresh your recollection you met with him on
17 August 10th?

18 **A.** It does, and that time frame sounds reasonable for the
19 time in which -- you know, by which we met with him, but I -- I
20 just -- I don't know the exact date.

21 **Q.** Okay. But you recall it was a few days after the tweet?

22 **A.** Yeah.

23 **Q.** Okay. And what was the purpose of that meeting?

24 **A.** I don't recall exactly the purpose. I -- we shared our
25 views on ways he could satisfy his objectives in -- in this

DEES - DIRECT / PORRITT

1 take private, but I don't -- I would need to refresh with the
2 materials that are I'm sure somewhere in here.

3 **MR. PORRITT:** If we could show to the witness
4 Exhibit 252?

5 (Document displayed.)

6 **THE COURT:** If it helps, they're also up on the
7 screen.

8 **THE WITNESS:** These are new. Okay. That's a new
9 crutch.

10 Yep, that does help.

11 **BY MR. PORRITT**

12 **Q.** Do you recognize Exhibit 252, Mr. Dees?

13 **A.** I do recognize it.

14 **Q.** And is this an email exchange you had with colleagues at
15 Goldman Sachs?

16 **A.** Yes. It's an email exchange with colleagues at
17 Goldman Sachs.

18 **Q.** Okay. And this is after your meeting with Mr. Musk?

19 **A.** I don't know. It says Tuesday -- it says it's Thursday,
20 August 9th. I thought you had referenced August 10th.

21 **Q.** I was looking at the top email.

22 **A.** Oh, I'm sorry. I'm looking at the bottom.

23 **MR. PORRITT:** If you scroll down there, I think there
24 is an email from Mr. Dees.

25 There it is.

DEES - DIRECT / PORRITT

1 BY MR. PORRITT

2 Q. That's Thursday, August 9th; correct?

3 A. Yeah. I -- I don't know what the timing is versus
4 vis-a-vis our meeting with Elon.

5 MR. PORRITT: Okay. We would move Exhibit 252 at this
6 point marked into evidence.

7 MR. SPIRO: No objection.

8 THE COURT: Admitted.

9 (Trial Exhibit 252 received in evidence.)

10 THE COURT: You may publish.

11 (Document displayed.)

12 BY MR. PORRITT

13 Q. In your meeting with Mr. Musk, do you recall him
14 mentioning the Saudi Arabia Public Investment Fund?

15 A. I remember him mentioning that. I don't know if it was in
16 that meeting. I just don't recall.

17 Q. Do you recall Mr. Musk discussing that he did not want the
18 Saudi Arabia Public Investment Fund funding 100 percent of any
19 taking private?

20 A. Yes.

21 Q. Okay. Do you recall any further about that, discussing
22 the percentage of the Saudi Public Investment Fund --

23 A. I'm sorry. Discussing what?

24 Q. Sorry. I'll slow down and rephrase.

25 A. I've got a loud fan behind me here.

DEES - DIRECT / PORRITT

1 **Q.** Do you recall anything else that Mr. Musk said about his
2 intentions regarding the percentage of involvement of the Saudi
3 Arabia Public Investment Fund and the potential going private?

4 **A.** Yeah. I remember in the context of him discussing his
5 objectives, he wanted a diversified equity base so that no
6 holder would be able to dictate terms.

7 If he could -- you know, that was one of the objectives,
8 would be such that no holder could dictate terms, including
9 with the Saudis, where they had a -- you know, a view to build
10 a Gigafactory there potentially sooner than he would want to
11 build a Gigafactory. "There" being Saudi.

12 **Q.** Do you recall he had a -- Mr. Musk expressed the view that
13 he did not want any one shareholder in a private Tesla owning
14 more of a percentage than he had?

15 **A.** Yes. That was -- that was one of the objectives he -- he
16 expressed at some point. I don't remember if it was in that
17 meeting.

18 **Q.** Okay. And his holding at that point was approximately
19 20 percent; is that right?

20 **A.** That sounds about right.

21 **Q.** Okay. And do you recall that as part of this going
22 private process, Mr. Musk expressed the view that he did not
23 intend to increase his percentage ownership in a private Tesla;
24 correct?

25 **A.** Yeah. Yes. Correct.

DEES - DIRECT / PORRITT

1 **Q.** So --

2 **A.** It was in the context -- just to be clear, oftentimes
3 these take-private transactions are transactions where you put
4 leverage on the company such that the existing owners concert,
5 you know, ownership goes up. And in this instance, he wasn't
6 thinking about putting more leverage on the company to increase
7 his ownership.

8 **Q.** Okay. So he, himself, wasn't looking personally to buy
9 shares in this going-private transaction?

10 **A.** I don't know about. He wasn't looking to -- increase his
11 equity ownership through leverage.

12 **Q.** You also -- do you also recall Mr. Musk discussing his
13 intent that he hoped that institutional -- that existing
14 institutional investors in Tesla would roll their ownership
15 into a private Tesla? Do you recall that?

16 **A.** Yes. Yes, I do.

17 **Q.** Do you recall whether at this time of your initial meeting
18 on August 10th Mr. Musk had actually spoken to any of these
19 institutional investors?

20 **A.** I don't recall.

21 **Q.** Okay. Do you know if he had spoken to any of them before
22 his tweets on August 7th?

23 **A.** I don't know.

24 **MR. PORRITT:** If we could show the witness

25 Exhibit 253?

DEES - DIRECT / PORRITT

1 Sorry. I have one more question on 252. I apologize. If
2 we could go back to Exhibit 252?

3 (Document displayed.)

4 **BY MR. PORRITT**

5 **Q.** If you look at the top email there from -- I think it's
6 Jonathan. My eyesight is poor, too. The blind leading the
7 blind.

8 Jonathan Armstrong, do you see that?

9 **A.** Yes, I do.

10 **Q.** And who's Jonathan Armstrong?

11 **A.** He's a member of our capital markets team. He's a
12 Goldman Sachs banker.

13 **Q.** Do you see that top email? It starts off "Regarding use
14 of an SPV"?

15 **A.** Yes.

16 **Q.** Okay. Do you know what "SPV" is referring to?

17 **A.** Yes. It's a special purpose vehicle.

18 **Q.** Okay. And do you recall what -- what topic this email
19 from Jonathan Armstrong was addressing?

20 **A.** Yes. I recall generally. The specifics of it not as
21 much, but the general issue was in the context of going
22 private. If you wanted all of your shareholders to have the
23 opportunity to participate and continue to own the stock
24 privately, you had to find some vehicle to aggregate their
25 ownership, to allow them to continue to own.

DEES - DIRECT / PORRITT

1 It's not a very eloquent description, but that's -- so
2 forming a special purpose vehicle that could be counted as one
3 holder, but have a bunch of holders, you know, having -- having
4 an interest in it was the -- was the structure that was being
5 explored.

6 **Q.** Okay. Was this a structure you were familiar with?

7 **A.** SPVs? Yeah.

8 **Q.** Okay. What about this concept of a private company with
9 SPVs to have a quarter, sort of -- a team of investors?

10 **A.** I'm familiar with it. I know some other technology
11 companies have used something similar, but I -- but I -- I
12 don't have any more specific than that.

13 **Q.** Okay. And this is because there's a legal limit to the
14 number of shareholders a private company can have; correct?

15 **A.** A limit to the number of shareholders without them
16 bringing other requirements, like reporting requirements and
17 other things like that, yes.

18 **Q.** Okay. And Mr. Armstrong cites an SEC rule saying if
19 you're circumventing the limit, then the structure sort of is
20 ignored and you'll be treated as a public company anyway; is
21 that correct?

22 **A.** I think at some point -- sorry. Let me see what he says.

23 **Q.** Okay.

24 **A.** Okay. I don't know. My understanding is if -- is if he
25 ended up with that, it may bring other reporting requirements.

DEES - DIRECT / PORRITT

1 You may have to get 40 Act comp readers. There's a level of
2 mechanical issues and details that are beyond me even still
3 reading that -- the email.

4 **Q.** And just to be clear, you're not an attorney; is that
5 correct?

6 **A.** I am not.

7 **Q.** Okay. Is it fair to say this is a complicated legal
8 regulatory issue?

9 **A.** Yes.

10 **Q.** Okay. Now if we can turn to Exhibit 253.

11 Do you recognize this?

12 **A.** Yes.

13 **Q.** And this is an email you sent to Brian Dong; is that
14 correct?

15 **A.** I think he sent it to me.

16 **Q.** I apologize. Sorry. That's correct. Sorry.

17 **MR. PORRITT:** At this point move to admit Exhibit 253.

18 **THE COURT:** Any objection?

19 **MR. SPIRO:** No objection.

20 **THE COURT:** Admitted.

21 (Trial Exhibit 253 received in evidence.)

22 (Document displayed)

23 **BY MR. PORRITT:**

24 **Q.** Do you recall receiving this email from Mr. Dong?

25 **A.** Not specifically.

DEES - DIRECT / PORRITT

1 **Q.** Okay.

2 **A.** I'm sure I did, but...

3 **Q.** Okay. Again, this email is discussing issues arising out
4 of attempts to go private with Tesla at this point?

5 **A.** It looks like it, yes.

6 **Q.** Okay. So by August 10th, this is three days after the
7 tweet, can you describe a general sort of the work that you and
8 your team were doing in connection with the go-private
9 transaction?

10 **A.** You see some of it here. Trying to think through
11 structures that could help Elon achieve the objectives he
12 wanted to achieve.

13 Because as you -- as you saw on the subsequent blog posts,
14 and I'm sure we'll -- we'll discuss, it wasn't just a matter of
15 having all the capital available. He then wanted to solve for
16 different objectives ideally, including allowing existing
17 investors to roll their stock in; allowing small investors, you
18 know, mom-and-pop investors who'd been with him for a long
19 time, to continue to own; having a more diversified ownership.

20 So amongst those objectives, it was starting to work with
21 him to understand those objectives to try to continue to
22 develop this process.

23 **Q.** Okay. And by -- as of August 10th, 2018, was the amount
24 of capital that you'd need to finance this going private, was
25 that amount determined?

DEES - DIRECT / PORRITT

1 **A.** At a 420 price you could determine -- you know, you could
2 do the math, say how much debt and how much equity you need.

3 **Q.** But was the amount of additional financing needed? Was
4 that understood at this point in time?

5 **A.** I'm not sure what -- what you mean by "additional
6 financing."

7 **Q.** Well, so you can multiply the total shares outstanding by
8 420 and that would give you a number?

9 **A.** Yeah, and add the debt.

10 **Q.** Yeah. Did you know how many shares you would actually
11 need to buy in order to accomplish a go-private?

12 **A.** Oh, are you asking how many would roll and, therefore --

13 **Q.** Yes.

14 **A.** Okay. No. You were making -- we were making assumptions
15 at that point.

16 **Q.** Okay. Was it ever determined how many shareholders would
17 actually roll into a potential going-private transaction at
18 Tesla?

19 **A.** Not definitively.

20 **Q.** Okay. I'd like to show you Exhibit 254.

21 **MR. PORRITT:** Please publish to the witness
22 Exhibit 254.

23 **THE COURT:** Okay.

24 **MR. PORRITT:** If it's not in, I'll move it in. I'll
25 ask the witness -- I'll lay the foundation and move it in

DEES - DIRECT / PORRITT

1 anyway.

2 **MR. SPIRO:** It's in.

3 **MR. PORRITT:** Oh, it's in.

4 Okay. So this is already in evidence. Thank you.

5 **THE COURT:** Okay.

6 **MR. PORRITT:** So, Derek, if you could, for the
7 witness, just scroll through.

8 (Document displayed.)

9 **THE WITNESS:** I see it.

10 **BY MR. PORRITT:**

11 **Q.** So, once again, if you turn to the second page of
12 Exhibit 254. See that's titled "Discussion Materials,"
13 August 10th?

14 **A.** Uh-huh.

15 **Q.** Does this further refresh your recollection that your
16 meeting with Elon Musk took place on August 10th?

17 **A.** Yeah. That's what it looks like.

18 **Q.** Okay.

19 **A.** That's when the book was dated, yes.

20 **Q.** Okay. And if I can refer you -- if I can refer you to
21 Number 3, "Overview of Selected Alternatives."

22 Do you see that?

23 **A.** Yes.

24 **Q.** And then is it fair to say that at this point you were
25 still exploring? You have three potential structures at this

DEES - DIRECT / PORRITT

1 point in time?

2 **A.** It's fair to say these were three structures that we were
3 discussing. I don't know if that was the limit of the
4 structures that you could -- you could ultimately do. But,
5 yeah, these are three structures that we were outlining to
6 potentially meet his objectives.

7 **Q.** Okay. And the middle one was the one involving the SPV
8 that you referred to before; is that correct?

9 **A.** Yes.

10 **Q.** Okay. And one of the points underneath that
11 Alternative 3 -- Alternative 2 notes that you may be able to
12 avoid a particular classification through non-conventional
13 approaches; is that correct?

14 **A.** That's what it says, yes.

15 **Q.** Is that a fair description of that entire Alternative 2,
16 that it was a non-conventional approach?

17 **A.** Yeah. It was non-conventional, yeah.

18 **Q.** And then if we go to the next slide.

19 (Document displayed.)

20 **Q.** This discusses the incremental financing need --

21 **A.** Yes.

22 **Q.** -- for each alternative; is that correct?

23 **A.** Uh-huh. Uh-huh. Yes.

24 **Q.** And it ranges from 22 billion to \$29 billion; is that
25 correct?

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1 **A.** Yes.

2 **Q.** Okay. And, again, does that confirm that at this point in
3 time the incremental financing was not -- you didn't have an
4 amount for incremental financing set at this point in time?

5 **A.** Well, again, this is a way to look at different
6 assumptions of who -- what percentage might roll.

7 Oh, yeah, these were just assumptions and estimates at the
8 time and assuming you didn't want to take more than a certain
9 amount from the PIF; right?

10 In other words, what you see in these three alternatives
11 is the only assumption made about the PIF in this was that they
12 rolled their existing amount that they invested in. This
13 wasn't any new.

14 So, yes, the incremental financing need would be that
15 piece spoken for by, you know, however you want to build the
16 equity book of interest.

17 **Q.** Okay. And you mentioned -- look at these assumptions.
18 You've got Tencent in Saudi PIF, 100 percent roll; do you see
19 that?

20 **A.** Yes.

21 **Q.** Had you spoken -- anyone at Goldman Sachs spoken to Saudi
22 PIF or Tencent at this point in time?

23 **A.** I don't recall.

24 **Q.** Okay. So this was an assumption?

25 **A.** I just don't remember. I don't remember if it had been

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1 confirmed or it was an assumption at the time.

2 **Q.** Okay. And then -- you then list T. Rowe, Fidelity,
3 Baillie Gifford, 75 percent roll. Do you see that?

4 **A.** Yes.

5 **Q.** Those are the three largest institutional investors in
6 Tesla at the time?

7 **A.** I believe they were the three largest, yeah.

8 **Q.** Okay. And, again, is a 75 percent roll, is that based on
9 conversations that you had with any of those, T. Rowe, Fidelity
10 or Baillie Gifford?

11 **A.** Not that I recall specifically. It could have been. I
12 just -- I don't remember specific conversations.

13 **Q.** Or it could just be an assumption --

14 **A.** Yes.

15 **Q.** -- that you would just choose 75 percent?

16 **A.** Yeah.

17 **Q.** Okay. And "other active investors," 25 percent roll,
18 that's another assumption?

19 **A.** Yes.

20 **Q.** Okay. And then "retail and other investors," it varies
21 across the different alternatives from 0 to 75 percent,
22 et cetera?

23 **A.** Right.

24 **Q.** Is it fair to say this is sort of scoping out the
25 potential alternatives and what it might mean for potential --

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1 for financing?

2 **A.** Yeah. I think that's -- yeah. I think that's one way to
3 characterize it.

4 **Q.** And if you look at the -- if you look at the next slide,
5 "High-Level Process Comparison," can you explain for the jury
6 what's being explained on this slide?

7 (Document displayed.)

8 **A.** It's a summary of the -- of the process of executing those
9 three different alternatives that we'd shown on that previous
10 slide, what you would do kind of step-by-step, including, you
11 know, meeting with the special committee, negotiating
12 agreement. You know, the things listed here. And then a
13 discussion of potential next steps to take --

14 **Q.** Okay.

15 **A.** -- depending on which of these structures you wanted to
16 choose.

17 **Q.** And is it conventional in the going-private transactions
18 to engage with a special committee on behalf of the target or
19 the company?

20 **A.** Yes. If a -- if an interested party is buying such, you
21 need to set up a special committee. So, yes, in this type of
22 circumstance, yes.

23 **Q.** Okay. And at this stage, by August 10th, had
24 Goldman Sachs, or anyone on behalf of Elon, started to engage
25 in the special committee for Tesla?

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1 **A.** I don't -- I don't recall.

2 **Q.** What was the take-away from the August 10th meeting with
3 Elon Musk for you and your team?

4 **A.** I don't remember. I don't recall.

5 **Q.** If you could refer to --

6 **MR. PORRITT:** Actually, show the witness Exhibit 256.

7 (Document displayed.)

8 **BY MR. PORRITT:**

9 **Q.** Do you see Exhibit 256, Mr. Dees?

10 **A.** Yes.

11 **Q.** Okay.

12 **MR. PORRITT:** And, first of all, we would move to
13 admit Exhibit 256 at this point.

14 **MR. SPIRO:** There's no objection. I think it's in.

15 **MR. PORRITT:** All right.

16 **THE COURT:** Okay.

17 **BY MR. PORRITT**

18 **Q.** If I can refer you to the second email there from
19 Elon Musk to you dated August 11th.

20 **A.** Yes.

21 **Q.** And then he says -- he says to you (as read) :

22 "Key question to solve is: Can we put together a
23 diverse enough investor lender group such that no single
24 investor can demand special terms?"

25 **A.** Yep.

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1 Q. Is that a continuation of what we were talking about in
2 terms of --

3 A. Yes.

4 Q. -- Mr. Musk did not want one individual investor owning a
5 significant percentage or too large a percentage in a private
6 Tesla?

7 A. Yes.

8 Q. Okay. And it says here, he then continues (as read) :

9 "Saudi Arabia would do the same" -- "would do the
10 entire thing, of course, as this is strategically critical
11 to their future, but they would require that we build a
12 Gigafactory there sooner than we prefer."

13 Do you see that?

14 A. Yes.

15 Q. Do you recall that the Saudi Arabia Public Investment Fund
16 would condition their investment on building a Gigafactory in
17 Saudi Arabia sooner than Tesla would otherwise prefer?

18 A. I recall it by reading this.

19 Q. Okay.

20 A. I don't know when in the process I was made aware, but
21 clearly I was made aware at least here.

22 **MR. PORRITT:** If we can refer the witness to
23 Exhibit 257?

24 **BY MR. PORRITT**

25 Q. Do you recognize Exhibit 257, Mr. Dees?

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1 **A.** I do.

2 **Q.** And that's an email from Greg Lemkau to you?

3 **A.** Yes.

4 **MR. PORRITT:** Okay. At this point we would move
5 Exhibit 257 into evidence, Your Honor.

6 **THE COURT:** Any objection?

7 **MR. SPIRO:** No, Your Honor.

8 **THE COURT:** Admitted.

9 (Trial Exhibit 257 received in evidence.)

10 (Document displayed)

11 **BY MR. PORRITT**

12 **Q.** I want to refer you to the sentence at the end of the
13 first line saying (as read) :

14 "Seems there is some time pressure to
15 announce our roll."

16 Do you see that?

17 **A.** I do.

18 **Q.** Okay. Do you recall that Elon Musk wanted to announce
19 Goldman Sachs' roll in any potential going-private transaction?

20 **A.** Yes.

21 **Q.** Okay. And what was Goldman Sachs' response to his request
22 to disclose your involvement?

23 **A.** We were okay with being disclosed, but we needed to get
24 through our internal processes first.

25 **Q.** Okay. And did he end up disclosing -- did Mr. Musk end up

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1 disclosing it before you had completed your internal processes?

2 **A.** He did while we were in the process of completing them,
3 yes.

4 **Q.** Okay. And if we can turn now to Exhibit 261. Do you
5 recognize Exhibit 261?

6 **A.** Yes.

7 **MR. PORRITT:** And at this point I move Exhibit 261
8 into evidence.

9 **THE COURT:** Any objection?

10 **MR. SPIRO:** No, Your Honor.

11 **THE COURT:** Admitted.

12 (Trial Exhibit 261 received in evidence)

13 **MR. PORRITT:** And if we can publish this email.

14 (Document displayed.)

15 **BY MR. PORRITT:**

16 **Q.** This is an email. Initially the lower email is from you
17 to Mr. Musk; is that correct?

18 **A.** Yes.

19 **Q.** And in it you lay out some conditions to Goldman Sachs
20 accepting the engagement to work with Mr. Musk in the
21 going-private; is that correct?

22 **A.** Yes.

23 **Q.** And I refer you to the three bullet points towards the end
24 there. It says (as read):

25 "You will keep the special committee fully apprised of

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1 your work and to abide by their requests.

2 "All future tweets and public communications shall be
3 precleared with your illegal and financial advisors.

4 "And our name will not be used without proper
5 consent."

6 Do you see that?

7 **A.** Yes.

8 **Q.** Until this time on August 14, 2018, Mr. Musk had used your
9 name without your consent; is that correct?

10 **A.** Well, when he announced our involvement in the
11 transaction, it was before we were ready to announce it, yes.

12 **Q.** Okay. And he had not precleared tweets and public
13 communications about the going-private transaction with his
14 legal and financial advisors; is that correct?

15 **A.** I don't know. He hadn't precleared with us.

16 **Q.** Okay. And why did you think it was important that he keep
17 the special committee fully apprised of his work and to abide
18 by their requests?

19 **A.** That's a pretty -- that's a pretty standard idea or
20 process in these -- in these situations.

21 **Q.** You didn't think it was improper for the special committee
22 to control public statements made by Elon Musk, who was bidding
23 for the company, potentially bidding for the company?

24 **A.** Could you ask the question again?

25 **Q.** You didn't think it was inappropriate for the special

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1 committee to have an element of control over public statements
2 by Mr. Musk in a transaction where he was potentially bidding
3 for the company?

4 **MR. SPIRO:** Objection. Vague.

5 **THE COURT:** Overruled.

6 **A.** I don't know that they did have that. I don't know -- I
7 don't know what that -- this says something different, "fully
8 apprised of your work" and "to abide by the requests."

9 This -- the preclearing of his communications is with
10 legal and financial advisors, not the special committee.

11 **BY MR. PORRITT**

12 **Q.** Did you understand that the special committee was going to
13 have some influence over the communications that you had with
14 Silver Lake, who you were working with in their outreach to
15 investors?

16 **A.** Yes, in the way that's very standard in these processes.

17 **Q.** Okay. And you viewed that as appropriate?

18 **A.** Yes. Very much so.

19 **MR. PORRITT:** Let me refer the witness to Exhibit 186.

20 **MR. SPIRO:** There's no objection.

21 **MR. PORRITT:** Move Exhibit 186 at this point,
22 Your Honor.

23 **THE COURT:** Admitted.

24 (Trial Exhibit 186 received in evidence.)

25 (Document displayed)

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1 BY MR. PORRITT

2 Q. Do you recognize 186, Mr. Dees?

3 A. I -- I recognize it to be a presentation from
4 Goldman Sachs.

5 Q. And it was sent to -- sent to Mr. Musk as well as yourself
6 on August 14th; isn't that correct?

7 A. Yes.

8 Q. Okay. And do you recall meeting with Mr. Musk on
9 August 15th, 2018?

10 A. I don't recall that date, but I know we met with him
11 again.

12 Q. Okay. You recall having a second meeting --

13 A. Yes.

14 Q. -- roughly a week after the tweets?

15 A. Yes.

16 Q. Okay. And in this, if I can refer you to -- it's 186-4.
17 (Document displayed.)

18 Q. Here you map out workstreams?

19 A. Yes.

20 Q. Okay. And including -- that is, one of the workstreams
21 there is "New Investors"?

22 A. Yes.

23 Q. And there were two sort of groups of new investors,
24 "Strategic" and "Financial"?

25 A. Yes.

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1 **Q.** Okay. And you see under "New Investors" under the
2 "Financial," there's a series of bullet points. This was
3 your -- this was the plan to execute over the next few days; is
4 that correct?

5 **A.** This is what we were proposing in this document, yes.

6 **Q.** Okay. And then the last point on -- for the "New
7 Investors" is to "require documentation/confirmation;" is that
8 correct?

9 **A.** Yes.

10 **Q.** So you were looking to obtain documentation confirming --

11 **A.** Yes.

12 **Q.** -- financing from those investors?

13 **A.** Yes.

14 **Q.** Okay.

15 **MR. PORRITT:** And if I can refer the witness to
16 Exhibit 265, which I think is in evidence.

17 **MR. SPIRO:** There's no objection.

18 **THE COURT:** Okay. Admitted.

19 (Trial Exhibit 265 received in evidence.)

20 (Document displayed.)

21 **BY MR. PORRITT**

22 **Q.** Exhibit 265 contains another presentation from
23 Goldman Sachs?

24 **A.** Yes, indeed.

25 **Q.** Lots of presentations being made at this time.

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1 **A.** This is what we do.

2 **Q.** I want to refer you especially to -- so on 265-3 and then
3 265-4.

4 (Document displayed.)

5 **Q.** So this is entitled "Potential Investor Universe;" is that
6 right?

7 **A.** Yes.

8 **Q.** Okay. So, again, this was a list -- well, it's titled
9 "Preliminary Target List;" correct?

10 **A.** Potential investors, yes. "Preliminary Target List," yes.

11 **Q.** All right. So this is a list of some of the investors you
12 were seeking to raise money for for a potential going-private
13 transaction?

14 **A.** This would have been a list of some of the investors that
15 could have been part of the ownership group, yes.

16 **Q.** Okay. And then if you can turn to 265-7.

17 (Document displayed.)

18 **Q.** You see here were the "Key Process Steps." Do you see
19 that?

20 **A.** Yes.

21 **Q.** And this is another thing that you and your team prepared?

22 **A.** Yes.

23 **Q.** And so at this point what stage were you in as of
24 August 15th, 2018?

25 **A.** In terms of our -- our stage? It would have been in --

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1 in -- well, in trying to broaden the investor base, given that
2 was what he wanted, we were in the process of -- of that early
3 part; you know, confirming the broad set of investors we'd go
4 to, confirming their interest, reaching out to a larger list,
5 you know, et cetera, all of -- all of that you see in the
6 left-hand side.

7 **Q.** Okay. Then I would end with "Collect Signed Commitment
8 Documents and Prepare Proposal;" is that correct?

9 **A.** That's ending with that, yes.

10 **Q.** Okay, yeah.

11 And as of this point, by August 15th, had you collected
12 any signed commitment documents from any potential investor in
13 a going-private transaction for Tesla?

14 **A.** Not that I recall.

15 **Q.** And if I can refer -- this predates what we were just
16 looking at, Exhibit 263.

17 **MR. PORRITT:** Can we refer Exhibit 263 to the witness?

18 **THE COURT:** Is 263 in evidence?

19 **MR. SPIRO:** This says 236 at the bottom.

20 **MR. PORRITT:** Yeah, not 236. 263. Sorry.

21 **THE COURT:** 263?

22 **MR. PORRITT:** Yes.

23 I don't believe this is in evidence, Your Honor.

24 **THE COURT:** I'm sorry. What?

25 **MR. PORRITT:** It's not in evidence yet, Your Honor.

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1 **THE COURT:** All right.

2 **MR. PORRITT:** But we would move it.

3 **BY MR. PORRITT**

4 **Q.** Do you recognize 263, Mr. Dees?

5 **A.** I recognize what it is, yes.

6 **Q.** Okay. And that's an email from Greg Lemkau to you and
7 others?

8 **A.** Yes.

9 **MR. PORRITT:** At this point we move Exhibit 263 into
10 evidence.

11 **THE COURT:** Any objection?

12 **MR. SPIRO:** No, Your Honor.

13 **THE COURT:** Admitted.

14 (Trial Exhibit 263 received in evidence.)

15 (Document displayed.)

16 **BY MR. PORRITT**

17 **Q.** And so I want to refer you to the bottom email from Greg
18 Lemkau to you dated August 14th titled "Sources of Capital."

19 **A.** Yes.

20 **Q.** And the last two points are -- well, towards the bottom
21 are the third and fourth points (as read) :

22 "Objective is to listen a bit to Elon."

23 And then (as read) :

24 "Identify all sources of capital in the world."

25 Is that correct?

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1 **A.** Ambitious, yes.

2 **Q.** And that culminated in the slide we were just looking at,
3 the "potential investors;" correct?

4 **A.** I don't know if that culminated in that, but that is a
5 broad universe of investors on that slide, yes.

6 **Q.** Okay. Did that slide -- I think it was Exhibit 265. Did
7 that contain a list of all the capital in the world?

8 **A.** No.

9 **Q.** But a decent subset of it?

10 **A.** It -- it was a lot of capital, yes.

11 **Q.** Okay.

12 **MR. PORRITT:** And if I can show the witness
13 Exhibit 194, which I believe was admitted today.

14 **THE COURT:** Any objection?

15 **MR. SPIRO:** No objection.

16 **MR. PORRITT:** I believe it was admitted prior this
17 morning, Your Honor.

18 **MR. SPIRO:** No objection.

19 **THE COURT:** Oh, sorry. It was already admitted?

20 **MR. PORRITT:** Yes, Your Honor.

21 **THE COURT:** Okay.

22 (Document displayed.)

23 **BY MR. PORRITT**

24 **Q.** Do you recall reaching out with a call asking permission
25 from the special committee to approach these investors listed

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1 in Exhibit 194?

2 **A.** I don't recall, no.

3 **Q.** Okay. If you look at the last point from Mr. Durban
4 saying (as read) :

5 "We do realize this process step is a bit unusual
6 considering they have not engaged a financial advisor at
7 this stage. However, speed is our collective highest
8 priority and this will help accelerate development of a
9 fully financed proposal."

10 Do you see that?

11 **A.** I do.

12 **Q.** Okay. At this point were you and Silver Lake trying to
13 develop a fully financed proposal?

14 **A.** Yes. At this point we were going out to additional -- or
15 we were asking to go out to additional sources of capital to
16 help fill his objectives --

17 **Q.** Okay.

18 **A.** -- to be able to have a more diversified equity ownership
19 base and, you know, all the things we've talked about already.

20 **Q.** Okay. And that's -- and that's on August 16th, 2018;
21 correct?

22 **A.** Yes, it is.

23 **Q.** Okay. And then did you attend a board meeting on
24 August 23rd, 2018?

25 **A.** I attended a board meeting, and I trust it was

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1 August 23rd. I don't know the dates, but, yes, I did.

2 Q. All right.

3 MR. PORRITT: Well, we can quickly show Exhibit 101 to
4 the witness. It's been admitted.

5 (Document displayed.)

6 BY MR. PORRITT

7 Q. And this shows the attendees there?

8 A. Yes.

9 Q. Do you see that?

10 A. I do.

11 Q. Okay. And you made -- you made a presentation to the
12 board; is that correct?

13 A. Yes.

14 MR. PORRITT: And if we can show Exhibit 201.

15 And if you could quickly scroll through some of the pages.

16 (Document displayed.)

17 BY MR. PORRITT

18 Q. Is this your presentation that you made at Silver Lake?

19 A. It's Silver Lake. It says "Silver Lake" down on the
20 bottom left, but I -- I think this is the document that was
21 used in that -- that was present in that meeting, yes.

22 Q. Is this the one meeting where Goldman Sachs didn't have
23 their own presentation?

24 A. Yeah. There you go.

25 Q. And you recall at that meeting you recommended not

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1 proceeding with the go-private transaction; is that correct?

2 **A.** Yes.

3 **Q.** Okay. Thank you, Mr. Dees.

4 **MR. PORRITT:** I reserve time for reexamination.

5 **THE COURT:** All right. Thank you.

6 **CROSS-EXAMINATION**

7 **BY MR. SPIRO**

8 **Q.** Good morning.

9 **A.** Good morning.

10 **MR. SPIRO:** At this time I'm going to move a few of
11 the other exhibits into evidence just to be efficient.

12 234 --

13 **THE CLERK:** Can you hold on just one minute, please.

14 **MR. SPIRO:** Sure.

15 (Brief pause.)

16 **THE CLERK:** Okay.

17 **MR. SPIRO:** -- 235, 244, 250, 251, 265, 817, and 818.

18 **THE COURT:** All right. Any objection to those?

19 **MR. SPIRO:** These were on the --

20 **THE COURT:** On the list?

21 **MR. SPIRO:** Correct.

22 **THE COURT:** And there were no objections?

23 **MR. SPIRO:** Correct.

24 **MR. PORRITT:** No objection, Your Honor.

25 **THE COURT:** All right. All those will be admitted.

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1 Thank you.

2 (Trial Exhibits 234, 235, 244, 250, 251, 265, 817, and 818
3 received in evidence)

4 BY MR. SPIRO

5 Q. So I want to take you back, Mr. Dees, to, you know, about
6 48 hours before the "Am considering" tweet. You know, the
7 world before the tweet.

8 And at that time you were not aware that on August 2nd
9 Mr. Musk made a bid to the board?

10 A. I was not.

11 Q. And you were not aware at that time that the board
12 convened an emergency meeting and spoke to Deepak Ahuja?

13 A. No.

14 Q. And you were not aware at that time that on August 3rd,
15 the day following the emergency meeting, Mr. Musk presented to
16 the board?

17 A. No.

18 Q. And as of that day, you also didn't know and had not
19 spoken -- well, you had not spoken directly to Mr. Musk that
20 week. So August 3rd, August 4th, 5th, 6th, you had not spoken
21 directly to Mr. Musk about his potential take private?

22 A. No, I had not.

23 Q. But you did know Mr. Musk before; correct?

24 A. Yes.

25 Q. And you knew his history in business?

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1 **A.** Yes.

2 **Q.** Pretty much every investor in bank does; right? He's
3 Elon Musk.

4 **A.** He's very well known.

5 **Q.** And you knew him to have a unique ability to raise
6 capital?

7 **MR. PORRITT:** Objection. Leading.

8 **MR. SPIRO:** He's on cross-examination.

9 **THE COURT:** Overruled.

10 **BY MR. SPIRO**

11 **Q.** Correct?

12 **A.** Yes. He was a very successful capital raiser.

13 **Q.** And he often in his rounds and rounds and in business
14 history used his own capital, didn't he?

15 **A.** Yes, he did.

16 **Q.** Now, on August 4th --

17 **MR. SPIRO:** If you could put up 174-16. It's already
18 in evidence. The text messages.

19 (Document displayed.)

20 **BY MR. SPIRO**

21 **Q.** On August 4th, 48 hours before the tweets, you didn't
22 know, sir, that half a decade or so later you'd be testifying
23 in a case in which Mr. Musk was accused of securities fraud in
24 federal court, did you?

25 **A.** I did not.

Q. Okay. And I'm going to read, and these were the text messages that came into evidence with Egon Durban, who was involved in Mr. Musk's considerations (as read):

"Dees told me he's convinced he doesn't need money."

And Egon Durban responds, "Very consistent."

Do you see that message from Egon Durban, "Very consistent"?

MR. PORRITT: Objection. Foundation, Your Honor.

THE COURT: Lay a foundation, please.

MR. SPIRO: This is an exhibit in evidence.

THE COURT: I know, but what's the source? What's --

you need to lay a foundation. This is not an email or text from this witness, is it?

MR. SPIRO: Well, no. I mean, it refers to him. It says "Dees told me."

THE COURT: That's why you need to lay a foundation.

Did Dees speak to one of the participants in this email, for instance?

BY MR. SPTRO

9. You know Mike Bingle?

A. I do know Mike Bingle.

Q. You don't remember saying this or something similar to Mike Bingle?

A. I don't remember specifically, but it wouldn't surprise me

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1 if I said something like that to Mike Bingle.

2 Q. So here we are on the morning of August 7th -- and if we
3 could put up -- so at this time, you know, Mr. Musk's meeting
4 about his considerations with Egon Durban and according to Mike
5 Bingle he says he's convinced he doesn't need money.

6 And the -- my handwriting is really something.

7 **MR. SPIRO:** 234, please.

8 (Document displayed.)

9 **BY MR. SPIRO:**

10 Q. Do you remember the morning of August 7th and an article
11 breaking in the *Financial Times* regarding the Kingdom of Saudi
12 Arabia?

13 A. I do.

14 **MR. SPIRO:** Okay. If we could just blow that up a
15 little bit so I make sure the jury can see that.

16 (Document enlarged.)

17 **BY MR. SPIRO**

18 Q. (As read) :

19 "Saudi Arabia's sovereign wealth fund has built a
20 significant stake in Tesla - the latest bold bet by the
21 state fund overseen by powerful Prince Mohammed bin
22 Salman."

23 Do you see that?

24 A. I don't see it on my screen, but, yes, that sounds like a
25 faithful reading of the article.

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1 **Q.** Okay. Thank you.

2 Is it not -- you don't have the article on your screen?

3 It's not popped up, or just a different part?

4 **A.** Just a different part. The bottom of it.

5 **MR. SPIRO:** Can we go scroll a little higher and blow
6 up the top part of this?

7 (Document displayed.)

8 **BY MR. SPIRO**

9 **Q.** Okay. Just to orient the jury, you do remember seeing
10 this article; right?

11 **A.** I do.

12 **Q.** Okay. And --

13 **A.** I'm sorry. I remember seeing the headline, yes.

14 **Q.** Okay. And the PIF was a client of Goldman Sachs, amongst
15 other banks?

16 **A.** Yes.

17 **Q.** And just so the jury understands, if you have two
18 different clients at Goldman Sachs or any bank, if you know
19 something about one client, you're not allowed to just go to
20 the other client and share it; true?

21 **A.** Yes, unless you get the permission.

22 **Q.** Okay. And you knew from your experience with the PIF that
23 sometime before the events in question they had wanted to give
24 direct capital to Tesla; true?

25 **A.** Yes.

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1 **MR. SPIRO:** And if we could go to 235.

2 (Document displayed.)

3 **BY MR. SPIRO:**

4 **Q.** You and your colleagues discussed this development on the
5 morning of August 7th; correct?

6 **A.** Yes.

7 **Q.** It says "Old News" because it's old news to you and
8 internally at Goldman Sachs, not because it's old news to the
9 world; fair?

10 **A.** It was not old news to the world, yes. Old news to us.

11 **Q.** And it's written -- and, again, it's your colleague, but
12 it says (as read) :

13 "I don't know what prompted them to leak it at this
14 point in time."

15 You don't know why it was leaked; right?

16 **A.** I do not.

17 **Q.** (As read) :

18 "So far they have financed it with cash. JPM did the
19 on-market purchase."

20 Do you see that?

21 **A.** I do.

22 **Q.** I don't think the jury has heard that JPM was involved in
23 this. Who is JPM?

24 **A.** JPMorgan.

25 **Q.** And who is their CEO?

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1 **A.** Jamie Dimon.

2 **Q.** Now, it says more information as you guys are trying to
3 figure this out, and it says "MOF" at the bottom of the second
4 line. It says (as read):

5 "Then some short-term funding through a delayed

6 settlement while they got money from the MOF."

7 Right? So they needed money from JPM for a second and
8 then they went to the MOF; right?

9 **A.** Yes.

10 **Q.** Okay. And the MOF for the jury is?

11 **A.** Ministry of Finance.

12 **Q.** Yeah. They went to the country to get more money?

13 **A.** That's what he's implying in this, yes.

14 **Q.** Okay. And you don't know what JPMorgan was up to behind
15 the scenes in this transaction, do you?

16 **A.** I do not.

17 **Q.** But from what you did know, the Saudi PIF had sufficient
18 capital to take Tesla private?

19 **A.** From what I know of the Saudi PIF, yes.

20 **Q.** Now, if you look at the time stamp on this email when you
21 all are discussing and trying to digest and figure out this
22 news, it's 9:56 a.m.

23 **MR. SPIRO:** And if we could put up Exhibit 8.

24 (Document displayed.)

25

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1 BY MR. SPIRO

2 Q. And you see that's 9:48 a.m. Do you see that at the
3 bottom of this?

4 And what I wanted to ask you was: The news of the PIF
5 that you're talking about here -- well, how did you react to
6 the "Am considering" tweet? What did you think when you saw
7 it?

8 A. By the way, I just -- I'll get to that. I don't know if
9 9:56 is Stuart Wrigley's time or my time.

10 THE COURT: That's a good point. We have to make sure
11 these two times are aligned. Is there some adjustment that
12 needs to be made?

13 THE WITNESS: Stuart Wrigley works in the Middle East,
14 so I -- I don't know the answer.

15 MR. SPIRO: We know these were approximately the same
16 time.

17 THE COURT: Same time zone?

18 MR. SPIRO: Yes, correct. Meaning, it's almost at the
19 same time as the tweet.

20 BY MR. SPIRO

21 Q. I don't want to overcomplicate this. They are talking
22 about the article that just broke, and the tweet comes out.

23 So in any event, what did you think when you saw the "am
24 considering" tweet?

25 A. I thought he was considering taking the company private,

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1 and I thought he had the capital to do it.

2 **Q.** Now, when you saw the "am considering" tweet, you didn't
3 block from your mind at that time everything you knew about
4 Elon Musk; did you?

5 **A.** I don't get it.

6 **Q.** Okay. You didn't block in your mind some way anything you
7 learned or knew about the Saudi PIF in this article and the
8 aftermath; right?

9 **A.** I don't recall what I had in my mind, but I'm not sure
10 what you're getting at.

11 **Q.** Well, I'm just saying you didn't, you know, try to block
12 all of your previous information and knowledge on earth from
13 your mind when you saw the tweet; fair?

14 **A.** That is fair.

15 **Q.** Okay. And after the *Financial Times* article, the stock of
16 Tesla goes up more than after the "am considering" tweet. Do
17 you remember that?

18 **MR. PORRITT:** Objection. Lacks foundation.

19 **THE COURT:** Sustained.

20 **BY MR. SPIRO**

21 **Q.** I'm asking, do you remember that?

22 **A.** I don't remember that. I don't remember which news would
23 cause the stock to go up more.

24 **Q.** Okay. And is it fair to say that no one really knows
25 exactly how or why the stock market moves the way it does?

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1 **MR. PORRITT:** Objection. Vague.

2 **THE COURT:** Sustained. Overbroad question.

3 **BY MR. SPIRO**

4 **Q.** Well, on August 7th, 2018 in the stock of Tesla, no one
5 really knows, nobody at Goldman Sachs really knew what was
6 exactly moving the stock in any which way; true?

7 **MR. PORRITT:** Objection. Lacks foundation.

8 **THE COURT:** Lay a foundation.

9 (Brief pause in the proceedings.)

10 **THE COURT:** You may resume, Mr. Spiro.

11 **MR. SPIRO:** Thank you.

12 **BY MR. SPIRO**

13 **Q.** There were a series of tweets that day, and one of the
14 tweets was attached to a blog post. Do you recall reading
15 that?

16 **A.** I do.

17 **Q.** Okay. And, again, when you looked at the blog post, you
18 didn't block from your mind all that other information; right?

19 **A.** I did not.

20 **Q.** Okay. And your reaction after reading the blog post at
21 the end of the day, what did you think of it?

22 **A.** I thought it was very good, very clear.

23 **Q.** After the 7th, fair to say that there was a bit of a media
24 storm around all this?

25 **A.** There was a lot of media.

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1 **Q.** Hundreds of articles?

2 **A.** There were was a lot of media. I don't know how many
3 articles. There was lots of media.

4 **Q.** Blog posts, opinion pieces, memes, the whole --
5 everything; right?

6 **A.** Yes.

7 **Q.** Okay. And what does it mean for a bank to be underweight
8 a stock?

9 **A.** If the bank's Research Department is underweight a stock,
10 it means their Research Department thinks investors should have
11 less of it. It's the vernacular equivalent of a sell.

12 **Q.** It's a net negative on the stock?

13 **A.** It's a net negative on the stock.

14 **Q.** And if you were underweight Tesla in 2018, you didn't do
15 so good 2018, 2019, 2020; right?

16 **MR. PORRITT:** Objection. Vague. Lacks foundation.

17 **THE COURT:** Sustained.

18 **MR. SPIRO:** If we can put up and show Exhibit 15,
19 which is in evidence.

20 And if we could blow up...

21 **BY MR. SPIRO**

22 **Q.** This is just one analyst of the many analyst reports out
23 there.

24 **MR. SPIRO:** And if you could bring up the... Yeah.

25 (Document displayed.)

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1 BY MR. SPIRO

2 Q. This report says (as read) :

3 "To us this suggests more" -- referring to the blog
4 post -- "more than a mere consideration."

5 In your impression of the blog post and where Mr. Musk was
6 as to August 7th, the genuineness of his intent and the steps
7 he had taken, did you conclude it was more than just a mere
8 consideration?

9 A. I don't remember making a specific judgment on that. I
10 remember thinking he was quite sincere and his objectives were
11 clear.

12 Q. And, I mean, in this -- this is the JPMorgan analyst
13 report. This says it's 50 percent. You know, coin flip;
14 right? It could go either way.

15 And if you go down here on this analyst report, it says
16 that (as read) :

17 "Mr. Musk stated current shareholders could continue
18 to participate in the private company, suggesting the
19 actual amount of needed cash could be far less than the
20 firm's current equity valuation."

21 And what that means is you could need far less funding if
22 people rolled and stayed in the private Tesla; right?

23 A. Yes.

24 Q. And there was no way to know exactly how much roll there
25 would be and how much extra funding there would be as of August

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1 7th; fair?

2 A. At that time there was no way to know exactly what the
3 roll would be.

4 Q. Okay.

5 MR. SPIRO: So if we could put away the JPMorgan
6 analyst report and if we could put up 244, please.

7 And if we could blow that up, please.

8 (Document displayed.)

9 BY MR. SPIRO

10 Q. Okay. And you see here it says -- this is an email
11 with you and Kurt at Goldman Sachs. Do you see how it says
12 (as read) :

13 "Elon Musk hates JPMorgan and Jamie"?

14 A. I see this says that, yes.

15 Q. And Elon Musk hates JPM and Jamie, and JPM and Jamie hate
16 him; is that right?

17 MR. PORRITT: Objection. Objection. Lacks
18 foundation.

19 THE COURT: Sustained.

20 BY MR. SPIRO:

21 Q. You are aware, as you sit here today, that Elon Musk hates
22 JPM and Jamie, are you not?

23 MR. PORRITT: Objection. Lacks foundation.

24 THE COURT: If you have a basis for knowing that, you
25 can state it.

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1 **A.** I know there's friction between the two partners. I
2 don't -- I don't know about the hatred.

3 **BY MR. SPIRO:**

4 **Q.** Well, you know that JPMorgan, after making billions of
5 dollars, sued Tesla regarding warrants at issue in this case --

6 **MR. PORRITT:** Objection.

7 **BY MR. SPIRO:**

8 **Q.** -- correct?

9 **MR. PORRITT:** Objection. Assumes facts. Lacks
10 foundation.

11 **THE COURT:** Sustained.

12 **MR. SPIRO:** Exhibit 243. If you could blow up the
13 email on August 7th.

14 (Document displayed.)

15 **BY MR. SPIRO**

16 **Q.** And you tell Mr. Musk on August the 7th (as read) :

17 "I thought your letter today was excellent. Very
18 clear."

19 See that?

20 **A.** Yes.

21 **Q.** And you're referring to the blog post; right?

22 **A.** Yes.

23 **Q.** And what it says, if you continue, is that (as read) :

24 "This whole topic feels very reminiscent of
25 conversations that we started together many, many months

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1 ago at Larry's house."

2 Do you see that?

3 A. I do.

4 Q. And is that Larry Ellison?

5 A. Yes.

6 Q. At the meeting at Larry's house, because I don't want to
7 confuse meetings, that was not a meeting that the CFO Deepak
8 Ahuja was at?

9 A. He was not at that meeting.

10 Q. Okay. But Larry Ellison was at that meeting?

11 A. Yes.

12 Q. SoftBank was at that meeting?

13 A. Masayoshi Son from SoftBank, yes.

14 Q. And at that meeting, Larry Ellison indicated that he would
15 be supportive of a go-private transaction; true?

16 A. At that meeting, Larry and Masa expressed how supportive
17 they were of Tesla, how supportive they were of Elon, and there
18 was discussion about the pros of going private -- about being
19 private.

20 Q. Larry Ellison, just so the jury has some context, has tens
21 of billions of dollars?

22 A. Yes.

23 Q. Masa Son and SoftBank have enough money to take Tesla
24 private by themselves; right?

25 A. Possibly. They have tens of billions of dollars, yes.

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1 **Q.** And you know from your dealings over the years, many
2 years, that a lot of the investors in Tesla are also investors
3 in SpaceX and other of Mr. Musk's companies; true?

4 **A.** Yes.

5 **Q.** And when Mr. Musk, in your experience, goes out, for
6 example, with a round of SpaceX, your phone even rings for
7 people trying to get inside the deal; right?

8 **A.** People will occasionally reach out to me to -- to try to
9 find a way in, yes.

10 **Q.** Just occasionally?

11 **A.** He doesn't raise equity that often at SpaceX, so, yes,
12 occasionally.

13 **Q.** And what happens in those scenarios, in your experience,
14 is the rounds are very quickly oversubscribed; right?

15 **A.** Yes.

16 **Q.** And these people have a long history, many of them, of
17 doing business together; right?

18 **A.** Many of his equity investors have a long history with him,
19 yes.

20 **Q.** So it would be totally consistent with one of them calling
21 up and saying, "Hey, I'd like a billion dollars" -- Larry
22 Ellison saying, "I'd like a billion dollars' worth. Save me
23 that amount." End of story; right?

24 Elon Musk and Larry don't have to ever talk about that
25 again. It goes to lawyers and other people and that's it;

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1 isn't that fair?

2 **MR. PORRITT:** Objection, Your Honor. Vague.

3 Ambiguous.

4 **THE COURT:** If he knows. If you have a basis for an
5 understanding.

6 **THE WITNESS:** I don't have a basis to answer that
7 question.

8 **BY MR. SPIRO**

9 **Q.** But it is fair to say that the shareholders at SpaceX are
10 many of the same shareholders as the shareholders at Tesla?

11 **A.** A number of shareholders at SpaceX are shareholders at
12 Tesla, yes.

13 **Q.** And there are also -- because I don't think the jury has
14 heard this. We've talked about funds and whether they can own
15 privates versus publics and what percentage. There are lots of
16 funds that own only privates; right?

17 **A.** Yes.

18 **Q.** Okay. Meaning private companies; right?

19 **A.** Yes.

20 **Q.** And one of the things about --

21 **MR. SPIRO:** And if we can go up to the August 8th
22 email.

23 (Document displayed.)

24 **BY MR. SPIRO**

25 **Q.** In here just the next day, if you look at bullet point

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1 two, you already have received very interested incoming calls;
2 right?

3 **A.** Yes.

4 **Q.** And even if the PIF wanted to and is able to fund the
5 entire thing, there were lots of reasons to continue to
6 diversify an investor base; right?

7 **A.** If that was his objective, which it was, yes, there
8 were -- there were reasons to continue to diversify.

9 **Q.** And another objective of his regarding the structure that
10 you're referencing in this email is that Elon Musk didn't want
11 to push the mom-and-pop retail investor out; right?

12 **A.** That's right.

13 **Q.** He didn't want to push the little guy out who had been his
14 investor that whole time as Tesla was growing; fair?

15 **A.** That was one of his objectives, yes.

16 **Q.** And that was one of the things unique about Elon Musk's
17 structure; right?

18 **A.** Yeah. The -- the work we were trying to do with the SPV
19 was a reflection of that.

20 (Document displayed.)

21 **Q.** Now, you saw an exhibit where, 252, you're talking
22 internally -- and this was already shown to you by plaintiffs'
23 counsel -- and there's a debrief of your phone call on
24 August 8th or 9th with Mr. Musk, and it indicates on the second
25 page (as read) :

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1 "After your and" -- that's I assume you -- "Dan Dees'
2 debrief, it sounds like there is ample potential
3 financing."

4 Right?

5 **A.** Yes.

6 **Q.** As you continue on with this email that you looked at, you
7 know, Goldman Sachs loops its different departments -- its
8 brainpower, its horsepower, its lawyers -- and nobody ever said
9 that this was impossible, did they?

10 **A.** Not that I recall.

11 **Q.** And, also, nobody thought that there was some fraud afoot
12 and that Goldman Sachs shouldn't be involved in this; right?
13 Nobody says that in this email?

14 **A.** No one says that in this email.

15 **Q.** And after this, there's calls between you and Mr. Musk;
16 right?

17 **A.** After -- at some point after, yes.

18 **Q.** Meetings?

19 **A.** Meetings, yes.

20 **Q.** Presentations?

21 **A.** Yes.

22 **Q.** And I'm not going to take you through all those
23 presentations --

24 **A.** Thank you.

25 **Q.** -- but Goldman Sachs stands by those presentations as

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1 their best estimates and beliefs at the time?

2 **A.** Yes.

3 **Q.** Now, one of those presentations, you know, was shown to
4 you by plaintiffs' counsel that had, like, an off-the-shelf
5 list of all the investors that could put in more than a billion
6 dollars?

7 **A.** Yes. It had a long list of investors that could put in
8 money, yes.

9 **Q.** Okay. But just because -- you didn't -- if Mr. Musk or
10 Silver Lake or you had spoken to an investor or had gotten a
11 verbal commitment or anything else, you didn't go back and
12 cross off that list or adjust that? That's just an
13 off-the-shelf-type list?

14 **MR. PORRITT:** Objection.

15 **THE COURT:** Overruled.

16 **A.** We wouldn't have gone back and crossed them off. They
17 would be included on that list.

18 **BY MR. SPIRO**

19 **Q.** Now, there were other questions about, you know, this
20 tweet that went out -- if we could just put it up. It's 361.
21 It's in evidence -- where Elon Musk said that he was excited to
22 work with Silver Lake and Goldman Sachs. Do you remember the
23 tweet?

24 **A.** Yes.

25 **Q.** Okay.

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1 **MR. SPIRO:** If we could put it up on the screen.

2 (Document displayed.)

3 **BY MR. SPIRO**

4 **Q.** And you got a bunch of questions about, you know, sort of,
5 you know, he hadn't cleared that with Goldman Sachs and, you
6 know, that was wrong. Do you remember those type of questions?

7 **A.** Yes.

8 **Q.** I mean, are you aware that he was sued for securities
9 fraud by the plaintiffs?

10 **MR. PORRITT:** Objection, Your Honor.

11 **THE COURT:** Pardon?

12 **MR. PORRITT:** I said objection. That's improper.

13 **MR. SPIRO:** He opened the door to this line of
14 questioning.

15 **THE COURT:** Overruled.

16 **BY MR. SPIRO**

17 **Q.** And are you aware, as you sit here today, that for
18 Mr. Musk saying "I'm excited to work with Silver Lake and
19 Goldman" before he had a technical engagement letter signed
20 with you, okay, he was sued for fraud by the plaintiffs. Do
21 you know that?

22 **A.** I did not.

23 **Q.** Okay. And while the timing of the tweet, okay, is what
24 was discussed, I think when you were being examined by
25 plaintiffs' counsel, the truth is if you look at Exhibit 817 --

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1 (Document displayed)

2 Q. -- the substance of the tweet was shown to Goldman Sachs
3 by Sam Teller, Mr. Musk's chief of staff, previously. It's
4 just the timing of the release that was really the issue; isn't
5 that fair?

6 A. That's fair, yes.

7 Q. And even after the tweet where he was sued for securities
8 fraud, you continued to work with him, didn't you? You moved
9 past the tweet?

10 A. Yes.

11 Q. Okay. And on August 15th, we've looked at, you know, the
12 presentations, and you continued to speak with Mr. Musk during
13 this time frame leading up to the board meeting; fair?

14 A. Yes.

15 Q. Okay. Now, you testified earlier about, you know, line of
16 sight into funding. That's how you viewed the tweet. And you
17 knew at or around this time that the PIF wanted to be part of
18 the Tesla go-private in big size?

19 A. Yes. I knew that based on what Elon had said.

20 Q. And you all continued to work and be in touch with folks
21 as these days and weeks progressed?

22 A. Yes.

23 Q. And so if some random reporter in some random outlet
24 reported that while you all are working together, you know,
25 based on your understanding of "funding secured" in the tweets

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1 that funding was far from secured, you would disagree with
2 that; right?

3 **MR. PORRITT:** Objection. Lacks foundation.

4 **THE COURT:** I'm not sure I understand the question.

5 Rephrase the question.

6 **BY MR. SPIRO:**

7 **Q.** You testified as to your understanding of the term; right?
8 And I'm saying, based on that understanding, you have no basis
9 to say that at that point when you're all working together,
10 that funding was far from secured?

11 **MR. PORRITT:** Objection.

12 **BY MR. SPIRO**

13 **Q.** In fact, you told the board on August 23rd that funding
14 was going to be available; true?

15 **MR. PORRITT:** Objection.

16 **THE WITNESS:** I don't understand the question.

17 **THE COURT:** Well, I think you should lay the
18 foundation by saying precisely what his understanding was of
19 "funding secured," and then you can ask the follow-up question
20 about far from funding secured. It's not clear. So lay the
21 foundation.

22 **BY MR. SPIRO**

23 **Q.** Well, earlier in your examination you testified what you
24 understood that to mean?

25 **A.** What "funding secured" means?

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1 Q. Right.

2 MR. PORRITT: Objection. Misstates testimony.

3 MR. SPIRO: Well, I could read back what he said.

4 THE COURT: Why don't you just ask him?

5 BY MR. SPIRO

6 Q. What did you say earlier to this jury about what you took
7 it to mean?

8 A. I thought it meant that he was in touch with the capital
9 required.

10 Q. Right. That he had a line of sight towards it; right?

11 A. That he had a line of sight towards it, yeah.

12 Q. Okay. And you know, right, from working and being at that
13 board meeting a week later that funding ultimately was
14 available for this transaction; right?

15 A. Yeah. It was our judgment that there was ample funding
16 available for the transaction.

17 Q. Ample funding; right?

18 A. Yeah.

19 Q. Okay. In fact, if we pull up 101. And if we look at the
20 assumptions that are in the board minutes. If we go up to --

21 (Document displayed)

22 Q. I mean, so -- so, I mean, Ron Baron, that's who's
23 highlighted now so we're going to go to him. He was somebody
24 who had announced publicly that he wanted to be in; right?

25 A. I don't remember his public announcement, but, yeah, Ron

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1 Baron was very supportive.

2 Q. Okay. And he was supportive even if he sometimes didn't
3 like Mr. Musk's tweets and thought he should have more ice
4 cream cones. He was still supportive when it came time to find
5 out if he had interest in this transaction; true?

6 A. I don't know about his view on the tweets or any of the
7 other stuff, but, yes, he was supportive of this transaction.

8 Q. And do you know who Gavin Baker is?

9 A. Yes.

10 Q. And he's a portfolio manager at Fidelity; right?

11 A. Yes.

12 Q. Okay. And you know -- do you know of Mr. Baker and
13 Mr. Musk's conversations?

14 A. Not that I recall.

15 Q. And in all of these meetings, by the way, about funding
16 and structure, did -- do you know who Professor Guhan
17 Subramanian is?

18 A. I do not.

19 Q. He wasn't there in any of this; right?

20 A. No.

21 Q. Okay. And if we could go back up to a couple other points
22 in the board minutes, which is (as read) :

23 "They assumed the transaction would be financed
24 without adding debt to Tesla's balance sheet. That the
25 transaction would be financed by approximately 50 percent

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1 new equity."

2 You could have added debt, bank financing to this
3 transaction and then you would have reduced the amount of
4 external capital you needed; true?

5 **A.** Yes. He have reduced the amount of external equity
6 capital he needed, yes.

7 **Q.** So a lot of the assumptions and the things that are
8 written in these presentations and in these minutes assumed no
9 bank financing and no extra debt; right?

10 **A.** No incremental debt, yes.

11 **Q.** Okay. And this 50 percent, do you know about the
12 conversation that Deepak Ahuja had had with the PIF about the
13 50 percent number just a couple weeks before?

14 **A.** I do not.

15 **Q.** And if we go down and you see the conservative estimate
16 from Goldman Sachs and others (as read) :

17 "The board then discussed with Mr. Musk's financial
18 advisors their preliminary discussions, assuming that he
19 would need approximately 30 billion to finance the
20 transaction."

21 And do you know whether that 30-billion number also came
22 up between the PIF and Deepak Ahuja?

23 **A.** Not that I -- I don't know.

24 **Q.** Now, Mr. Musk at this meeting noted that (as read) :

25 "There was more than enough funding for any proposed

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1 transaction and that he had asked his financial advisors
2 to join the meeting to review the board" -- "with the
3 board the various potential financing sources available."

4 When Mr. Musk said that, do you believe his -- that view
5 was genuine?

6 **A.** I do.

7 **Q.** And based on everything you understood at the time, did
8 you believe that the PIF wanted to be part of this transaction?

9 **A.** Based on what I understood at the time, yes.

10 **Q.** And while there were questions about how it would be done
11 with the roll and the debt, it's not fair to say that Mr. Musk
12 didn't make a proposal originally to start the process with the
13 board. That's not true?

14 **A.** I'm sorry. What's the question?

15 **Q.** Yeah. There's a question raised about whether or not
16 there had been a proposal, a formal proposal, of this and there
17 was, you know, a wordsmithing.

18 But ultimately just because there were questions around
19 how much debt there would be or how much would roll doesn't
20 mean that Mr. Musk hadn't made a proposal to the board on
21 August 2nd, does it?

22 **MR. PORRITT:** Objection, Your Honor.

23 **THE COURT:** Sustained.

24 That needs to be more precise. If you're going back to
25 the reference of the process, you should make sure that what

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1 you're asking is precisely in line with what was in that
2 document.

3 **MR. SPIRO:** What document?

4 **THE COURT:** Because we've been talking about proposal,
5 formal proposal, et cetera, et cetera. I'm fearful that we're
6 mixing up concepts here.

7 **MR. SPIRO:** I think they've been completely mixed up
8 the whole time, but I don't know how to unmix them --

9 **BY MR. SPIRO**

10 **Q.** All I'm asking is: Whatever the mixing has been and the
11 wordsmithing, the reality is nothing will ever change the fact
12 that on August 2nd Mr. Musk made a proposal to the board that
13 started this whole process going?

14 **MR. PORRITT:** Objection. Lacks foundation.

15 **THE COURT:** I think he said he -- well, if he's aware
16 of it, you can answer that question.

17 **THE WITNESS:** I'm not aware of it.

18 **THE COURT:** Okay.

19 **BY MR. SPIRO**

20 **Q.** Mr. Musk -- let me put it to you this way: Mr. Musk was
21 the actual buying party here; right?

22 **A.** Yes.

23 **Q.** Okay. Because there's some confusion, I think, also in
24 that. Was the PIF the buyer? Was Mr. Musk the buyer?
25 Mr. Musk is the principal buyer; is that fair?

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1 **A.** Yes. He would lead the buyer group, yep.

2 **Q.** And the engagement letter that he ultimately signed with
3 you indicates that Mr. Musk is the buyer. He would owe the
4 fees, not Tesla. He was your client?

5 **A.** Yes.

6 **Q.** And, in fact, one of the reasons that there was a delay
7 when he released the tweet, it was because you all had to check
8 conflicts internally because you had done work for Tesla before
9 and this would mean you would be opposite Tesla; fair?

10 **A.** Yeah. That's one of the things, yeah.

11 **Q.** And, you know, in all this formal/informal conversations
12 and, you know, Michael Dell this.

13 **MR. SPIRO:** You know, if we could just show the
14 witness 251.

15 **BY MR. SPIRO**

16 **Q.** You know, the truth of the matter is that Mr. Musk --

17 **MR. SPIRO:** And if we could blow up the 6:00 p.m.
18 August 9th email.

19 (Document displayed.)

20 **BY MR. SPIRO**

21 **Q.** Mr. Musk had this -- your understanding was Mr. Musk had
22 the same lawyer as Michael Dell; right?

23 **A.** Yes.

24 **Q.** Okay. And that when Michael Dell did his transaction,
25 looking back at the press release to see who was involved and

DEES - CROSS / SPIRO

1 the army of lawyers and everything else, you write (as read) :

2 "So Michael just had a lawyer and that's it."

3 Was that your understanding at the time?

4 **A.** That's my understanding.

5 **Q.** Now, I understand that in these big deals ultimately lots
6 of lawyers and finance folks get involved and there's lots of
7 contracts and documents. Is it -- is it fair to say that these
8 things can often start with an informal bid from a principal to
9 a principal?

10 **A.** Sure.

11 **Q.** And that could come, like, a letter to a board; right?

12 **A.** Yeah.

13 **Q.** Somebody could make an announcement in a press release,
14 say "I intend to buy Starbucks;" right?

15 **A.** Sure.

16 **MR. PORRITT:** Objection, Your Honor. Lacks
17 foundation. I don't -- what's the relevance of this testimony?

18 **BY MR. SPIRO**

19 **Q.** And --

20 **THE COURT:** Overruled.

21 **BY MR. SPIRO**

22 **Q.** And as those transactions progress, right, sometimes
23 investors come in, sometimes investors back out. The principal
24 always has the option, if they have the wherewithal, to finance
25 part of the transaction themselves; right?

A. I can't comment on theoretical transactions. Does a principal have an opportunity to put in money to a transaction? Sure.

Q. And however unique or unconventional Mr. Musk is in some of these things that you've testified about, you always believed that his desire here and his intentions were genuine; true?

A. I did.

Q. And you never reached the conclusion that anything about this, you know, was, you know, some sort of a lie, big elaborate lie, to the shareholders, did you?

A. I did not.

Q. And ultimately, as we saw in that board presentation, your conclusion was that the funding, the availability of funding, was just not going to be the issue?

A. That is right.

MR. SPIRO: I have no further questions.

THE COURT: All right. How much longer? We are actually past our break time, but I would like to complete this witness if possible. Do you have --

MR. PORRITT: I'll be very quick, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. PORRITT

Q. Thank you, Mr. Dees.

DEES - REDIRECT / PORRITT

1 You just had some questioning where Mr. Spiro described a
2 formal proposal to take a \$60 billion company private as mere
3 wordsmithing.

4 **MR. SPIRO:** Objection as to the characterization of
5 that, the inference of that.

6 **BY MR. PORRITT**

7 **Q.** Is a --

8 **THE COURT:** All right. So rephrase the question.

9 **MR. PORRITT:** All right.

10 **BY MR. PORRITT**

11 **Q.** Would you regard a formal proposal to take a \$60 billion
12 company private to be mere wordsmithing?

13 **A.** I'm not even sure how to answer that. The question
14 doesn't make a lot of sense to me.

15 **THE COURT:** Why don't you rephrase the question.

16 **BY MR. PORRITT**

17 **Q.** Is a formal proposal to take a \$60 billion public company
18 private a serious financial and legal document?

19 **A.** It depends on what stage your -- of the process you're in.

20 **Q.** Now, you talked a little bit about SPVs. We talked a
21 little bit about the structure of SpaceX.

22 To your knowledge, is it possible for retail mom-and-pop
23 investors to invest in SpaceX directly or through an SPV?

24 **A.** I don't know. They can get access to it through various
25 funds. It could have Gavin Baker's funds in it. A retail

DEES - REDIRECT / PORRITT

1 mom-and-pop's own Gavin Baker's fund, they can get access to
2 it. I don't know the answer on SPVs.

3 **Q.** Okay. But they don't own a share in SpaceX; they own a
4 share in Mr. Baker's fund, for instance?

5 **A.** In that instance, yeah.

6 **Q.** And Mr. Baker's funds owns lots of shares in lots of
7 different companies?

8 **A.** In that -- in that example, yes.

9 **Q.** Okay. And you -- you recall your advice to the board that
10 you thought that funding for a going-private transaction was
11 reasonably available; is that right?

12 **A.** Yeah.

13 **Q.** Okay. You understand there's a difference between funding
14 being available and funding being committed? Is that a
15 distinction you have?

16 **A.** Sure.

17 **Q.** Okay. And is -- I mean, all banks have funds that are
18 reasonably available. It doesn't mean I can just assume
19 they're going to lend me money; isn't that correct?

20 **A.** Sure.

21 **Q.** Okay.

22 **MR. PORRITT:** That's all I have, Your Honor.

23 **THE COURT:** All right. Thank you.

24 Anything on recross?

25 **MR. SPIRO:** No, Your Honor.

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1 **THE COURT:** All right. Mr. Dees, thank you. You may
2 step down. You're excused as a witness.

3 (Witness excused.)

4 **THE COURT:** And we will go ahead and take our
5 20-minute break. Thank you.

6 **THE CLERK:** All rise for the jury.

7 (Jury exits the courtroom at 12:30 p.m.)

8 **THE COURT:** Who's up next?

9 **MR. PORRITT:** Next we intend to call the much delayed
10 Ryan Brinkman via videotape, Your Honor.

11 **THE COURT:** Okay. All right. See you in 20.

12 (Whereupon there was a recess in the proceedings
13 from 12:31 p.m. until 1:10 p.m.)

14 (The following proceedings were held outside of the
15 presence of the Jury)

16 **THE COURT:** All right, sorry for the delay. Had to
17 overcome yet more technical difficulties, but I think we have
18 got it straightened out. So why don't we retrieve the jury.
19 And if you want to bring the witness up, save some time, you
20 can do that.

21 **MR. APTON:** Sure, Your Honor. We're going to be
22 playing or calling --

23 **THE COURT:** That's right.

24 **MR. APTON:** Yeah.

25 **THE COURT:** Well, make sure you are pulled up ready to

PROCEEDINGS

1 go.

2 **MR. APTON:** We are Your Honor. We're ready.

3 **THE COURT:** Okay.

4 **MR. APTON:** And Your Honor the exhibits that will be
5 referred to in this clip, they were moved into evidence already
6 so they should be published to the jury, as the transcript was.

7 **THE COURT:** And my understanding, there were two
8 exhibits that were inadvertently included.

9 **MR. APTON:** That is true, Your Honor.

10 **THE COURT:** And that was Numbers --

11 **MR. APTON:** 24 and 25.

12 **THE COURT:** 24 and 25. So we will remove those from
13 the admitted witness list. Right?

14 **MR. APTON:** Yes, Your Honor.

15 **THE COURT:** Correct?

16 **MR. APTON:** And they are not referenced in the
17 deposition clips.

18 **THE COURT:** All right. Okay. Thank you.

19 **MR. APTON:** And I don't know if Your Honor wants this
20 now, but we do have an agreed-upon time allocation.

21 **THE COURT:** You can give that to Vicky, appreciate
22 that.

23 **MR. APTON:** Okay.

24 **THE COURT:** Thank you.

25 As we reach towards next week I do want to make sure that

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1 we have an exhibit list that we can give to the jury as kind of
2 an index that briefly describes, without argumentation, stuff.
3 Especially with the number of exhibits here. Juries, I think,
4 appreciate an index. They'll know if they are looking for a
5 particular email from X to Y they can at least find it, rather
6 than trying to shuffle through hundreds of exhibits.

7 **MR. APTON:** And Your Honor, would the descriptions we
8 had on our exhibit list, more or less suffice?

9 **THE COURT:** I would have to look at it again, but
10 probably.

11 **MR. APTON:** Okay. Okay.

12 **THE COURT:** All right?

13 **MR. APTON:** Your Honor, one quick question. Do you
14 intend on taking a break before the end of the day?

15 **THE COURT:** Yeah. I don't think we can go two and a
16 half hours. We need to take some kind of break, so we'll
17 probably go like an hour and 15 or something.

18 **MR. SPIRO:** And I'll just -- I feel an obligation to
19 sort of say this, but just so the Court's aware, the first
20 witness after the videotape is flying out of the country back
21 home, and so we're -- they're going to make it, but we're on a
22 tight sort of timeline from our perspective.

23 **THE COURT:** Okay.

24 **MR. SPIRO:** Just, you know.

25 **THE COURT:** How long is the video?

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1 **MR. APTON:** It's an hour, Your Honor.

2 **THE COURT:** Hour, and then that'll take us to about
3 2:15. And how long will the testimony be of this witness?

4 **MR. SPIRO:** I think approximately 30 minutes for both
5 sides.

6 **MR. APTON:** Yeah, Your Honor, we spoke about this in
7 the hallway before. Everything should be good to go on timing.
8 And Ms. Denholm's late. She's the next witness after the
9 video.

10 **THE COURT:** Right.

11 **MR. SPIRO:** So I guess I would ask, again, I'm just
12 making a request to the Court, but that she be able to go right
13 after the video.

14 **THE COURT:** All right.

15 **MR. SPIRO:** And then break, and hopefully a short
16 break, because there's another witness, human witness, live
17 witness, that also has traveled and has been here for quite
18 some time. Many days.

19 So I'm hoping that the break is quick and I'm hoping that
20 Ms. Denholm who's flying to Australia this afternoon can go
21 immediately following the video.

22 **THE COURT:** All right. So I'm going to plan on not
23 taking a break until after she testifies.

24 **MR. SPIRO:** Thank Your Honor.

25 **THE COURT:** But hopefully you are not going to go too

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1 long, because that means going two hours without a break.

2 **MR. SPIRO:** We won't. Thank Your Honor.

3 **THE COURT:** Which will bring us close to the 3:30 hour
4 in any event, so we'll see.

5 (A pause in the proceedings)

6 (The Jury enters the courtroom)

7 **THE COURTROOM DEPUTY:** All rise for the jury.

8 **THE COURT:** Okay, have a seat, everyone. Good
9 afternoon to the jury. How was lunch?

10 (Jurors thank the Court)

11 **THE COURT:** You're welcome.

12 They even had fried chicken while we were working, just to
13 be clear.

14 All right. So let's pick up with the next witness which
15 we understand will appear by video.

16 **MR. APTON:** Yes, Your Honor. At this point in time,
17 plaintiffs call by deposition Ryan Brinkman of JP Morgan.

18 **MR. SPIRO:** And we maintain our objection, Your Honor.

19 **THE COURT:** All right. So objection is overruled, and
20 you can go ahead and play the video.

21 **RYAN JOSEPH BRINKMAN, PLAINTIFF'S WITNESS,**

22 **BY VIDEOTAPED DEPOSITION**

23 (Time played: 1:20 p.m to 2:22 p.m)

24 **MR. APTON:** That's the end of Mr. Brinkman,
25 Your Honor.

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1 **THE COURT:** All right. Thank you. Why don't you go
2 ahead and call your next witness.

3 **MS. TRIPODI:** Good afternoon, Your Honor. Plaintiffs
4 are calling Robyn Denholm.

5 **THE COURT:** Okay. Thank you.

6 **MS. TRIPODI:** And Your Honor if I may, I have a
7 witness binder and a deposition transcript.

8 **THE COURT:** All right.

9 (Documents handed up to the Court)

10 (Documents tendered)

11 **THE WITNESS:** Thank you.

12 ROBYN DENHOLM, PLAINTIFF'S WITNESS, SWORN

13 **THE WITNESS:** Yes, I do.

14 **THE COURTROOM DEPUTY:** Thank you. Please be seated.

15 Please speak clearly into the microphone. State and spell your
16 first and last name for the record.

17 **A** It is Robyn Denholm, R-O-B-Y-N, D-E-N-H-O-L-M.

18 **THE COURT:** Thank you Ms. Denholm. You may proceed
19 Ms. Tripodi.

20 DIRECT EXAMINATION

21 **BY MS. TRIPODI**

22 **Q** Good afternoon, Ms. Denholm. I understand we are under
23 some time constraints, so I'm going to dive right in.

24 **A** Perfect.

25 **Q** You were a member of the Tesla board of directors in 2018,

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1 correct?

2 **A** Yes, I was.

3 **Q** And you are currently serving as the chairperson of the
4 Tesla board of directors. Correct?

5 **A** That is correct.

6 **Q** And also, in 2018, you were the chairperson of the Tesla
7 board's audit committee, is that correct?

8 **A** That's correct, yes.

9 **Q** And just so the jury understands what the audit
10 committee's function was, some of its main responsibilities
11 were oversight of Tesla's financials? Is that right?

12 **A** No. Oversight of the management's preparation of the
13 financials, yes.

14 **Q** Okay. And then how about ensuring that management were
15 doing their role with respect to various internal control
16 policies? Is that right?

17 **A** Yes. The board's responsibility is to actually make sure
18 that the management team and the finance team and the internal
19 auditors are doing their role as it relates to internal
20 controls.

21 **Q** Understood. And so the internal controls that management
22 would be responsible for, those would have included the
23 disclosures related to material non-public information, is that
24 correct?

25 **A** There's a set of disclosure controls that are in place

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1 around the internal controls, yes.

2 **Q** And the jury has heard a bit this week about material
3 non-public information, but just so that we're all on the same
4 page, MNPI, or material non-public information, generally
5 refers to corporate news or information that hasn't yet been
6 made public but could have an impact on the company's stock
7 price; is that generally correct?

8 **A** It would need to be something that would be significant
9 enough that would make an impact that was material to the
10 financials or material used to the company.

11 **Q** So something that would have a significant impact
12 potentially on the company and its stock price?

13 **A** Potentially, yes.

14 **Q** And am I correct that in 2018, Tesla had a process whereby
15 prior to disclosure of material non-public information, there
16 would be an internal review?

17 **A** There, there was a policy that actually required the
18 internal review of any material information that was being
19 published was -- on behalf of Tesla, was actually reviewed.

20 **Q** Now, Mr. Musk's Twitter account, that is a corporate
21 channel or it's considered by the company to be a corporate
22 channel to disseminate Tesla information. Correct?

23 **A** No. His Twitter account, when he's tweeting about Tesla,
24 can be a corporate channel, but there's other channels.
25 There's a Tesla Twitter account, and obviously there are

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1 regular filings and 8-Ks, press releases, those types of things
2 that are actually put out on behalf of the company. So not
3 everything that is in Elon's Twitter account is part of Tesla
4 or Tesla information.

5 **Q** Understood. So since Mr. Musk though is the CEO of Tesla,
6 generally when he's tweeting about Tesla, is that considered to
7 be Mr. Musk tweeting about Tesla corporate information?

8 **A** No. It depends on what he's tweeting. If he's talking
9 about product or if he's talking about activities at the
10 company, it could be on behalf of Tesla or it might be his own
11 personal information. He tweets about SpaceX, for example.
12 That is not on behalf of Tesla.

13 **Q** Understood. But that's about SpaceX, not about Tesla.
14 Correct?

15 **A** True. Yes.

16 **Q** Okay. So if Mr. Musk wanted to put out material
17 non-public information regarding Tesla through his Twitter
18 account, would he have to go through this internal review
19 process?

20 **A** If it was on behalf of Tesla, he would go through a review
21 process.

22 **Q** Okay. So in terms of what occurred in August of 2018, if
23 you will help me walk through this process.

24 On August 1st, am I correct that Mr. Musk sent the board
25 an offer to take Tesla private at \$420 per share, which is

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1 reflected in Exhibit 1 (sic). So, Derek can pull that out for
2 you.

3 **A** Exhibit 1? Sorry.

4 **Q** Oh, it's 81, and it will be pulled up in one moment on the
5 screen.

6 **A** Okay, thank you.

7 **Q** And it's also going to be in your witness binder.

8 (Document displayed)

9 **A** Oh, yes. So it's August 2nd, there was a letter that Elon
10 sent to the board. And yes, I received this letter.

11 **Q** And at this point, this offer letter that you've received,
12 Exhibit 82, was this considered to be material non-public
13 information?

14 **A** Well, it wasn't public. It was material to the company in
15 that he was offering in his personal capacity, to make a bid to
16 take the company private.

17 **Q** So after the board receives the offer letter that we see
18 in Exhibit 82, the board convened to discuss the offer the same
19 day. Is that correct?

20 **A** That's correct.

21 **Q** And then the following day the board, on August 3rd, met
22 with Mr. Musk to obtain more information regarding the
23 potential transaction. Is that --

24 **A** That's correct, yeah.

25 **Q** And at that meeting with Mr. Musk on August 3rd, am I

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1 correct that the board had questions regarding the structure of
2 the potential deal, the price, the process?

3 **A** We asked him a series of questions. Obviously, in
4 receiving this letter, there were questions that we had about
5 the transaction that he was contemplating. And as a bidder in
6 this case, we asked him questions.

7 **Q** Understood. So if we can look at the board minutes from
8 that August 3rd meeting, that is Exhibit 83 which has already
9 been admitted and should pop up on your screen in a moment.

10 **A** Yes, yeah.

11 (Document displayed)

12 **Q** Do you see your name, indicating that you attended the
13 meeting?

14 **A** Yes. I was in Australia, so I was on the phone.

15 **Q** Okay. And if we can look to Page 3, please, of the
16 meeting minutes.

17 (Document displayed)

18 **Q** You will see in that first paragraph, the minutes noted
19 that the board was needing a detailed proposal regarding a
20 going-private transaction. Is that correct?

21 **A** Sorry, repeat your question?

22 **Q** Sure. The minutes note that at this meeting the board was
23 requesting a detailed proposal from Mr. Musk regarding the
24 going-private transaction. Is that correct?

25 **A** What we -- we did not have a detailed proposal at this

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1 point. And we were saying that once we received that, we would
2 do what we needed to do, which was to evaluate whether or not
3 that proposal was in the best interest of all shareholders at
4 Tesla.

5 **Q** The board at this same meeting -- and in the same
6 paragraph it references this -- authorized Mr. Musk to have
7 what are referred to here as "initial conceptual conversations"
8 with a few top shareholders to gauge interest. Is that
9 correct?

10 **A** Yes. What -- the next steps we agreed was that Elon would
11 have hypothetical conversations with shareholders, not
12 disclosing, from a Tesla perspective, any material information,
13 but to gauge interest in this type of transaction.

14 **Q** Understood. And were you concerned about these types of
15 conversations?

16 **A** Well, I wanted to make sure that because he was going to
17 have these conversations with investors, that -- that from the
18 perspective of him being a bidder and also being the CEO, he
19 had information about the company that investors did not have
20 at that point in time.

21 **Q** Understood. So in this process of these hypothetical
22 initial conceptual conversations, the board involved lawyers.
23 Correct?

24 **A** I'm sorry, what does that mean?

25 **Q** Were lawyers involved in preparing for these initial

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1 conceptual conversations?

2 **A** Ye- -- the inside counsel, Todd Maron, the GC at the time
3 at Tesla, the general counsel, was involved in the board
4 meeting and also involved in a discussion that I had with him
5 after the board meeting.

6 **Q** So essentially at this meeting there was a plan for
7 Mr. Musk to gauge, without selectively disclosing material
8 information. Is that correct?

9 **A** It was to be a hypothetical conversation at a high level.
10 And it was, again, not to disclose information that Tesla did
11 not want in the public domain.

12 **Q** At this point in time, were you of the opinion that these
13 initial conceptual conversations could occur and be successful
14 in terms of Mr. Musk's objective of gauging shareholder
15 interest?

16 **A** I think it would have been difficult, but possible.

17 **Q** I was going to ask. You won't be the first person here at
18 the trial to testify that Mr. Musk can't do the impossible,
19 will you?

20 **A** I'm sorry?

21 **MS. THOMPSON:** Objection, relevance.

22 **MS. TRIPODI:** I'll move on, Your Honor.

23 **BY MS. TRIPODI**

24 **Q** So if we could look at Exhibit 8, please?

25 **A** Uh-huh.

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1 (Document displayed)

2 **Q** So forget selective disclosure at this point. Do you
3 recognize the tweet in Exhibit 8?

4 **A** I do recognize this.

5 **Q** So on August 7th, Mr. Musk tweets that he has funding
6 secured for taking Tesla private at \$420 per share. Am I
7 correct?

8 **A** He says that he's considering taking Tesla private at
9 \$420. And he does say "Funding secured."

10 **Q** So, what was material non-public information four days
11 before when the board had met with Mr. Musk has suddenly become
12 very public. Very suddenly and unexpectedly. Am I correct?

13 **A** Well, it is not selective disclosure, because he's
14 published it to the world. And what's material about this
15 statement is that he's considering taking the company private.
16 That's a very material item.

17 But it's not selective disclosure, so from that
18 perspective, everybody, all shareholders, were -- were given
19 the information at the same time.

20 **Q** Understood. But you were surprised that Mr. Musk had made
21 this disclosure, were you not?

22 **A** I was surprised because at the meeting beforehand, we had
23 -- we had not agreed that this would be the course of action.
24 But having said that, he was the bidder. And quite honestly,
25 he could have notified the shareholders or the world that he

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1 was considering this.

2 If he was a third party, if it was Silver Lake bidding for
3 the company, they could have -- even after they talked to the
4 board, they could have made that information public. Because
5 it's not -- it's not Tesla's information, it's the bidder's
6 information.

7 **Q** Understood. But here with the bidder, Elon is the bidder
8 making this information. Would you agree that these two
9 sentences are somewhat incomplete for the type of disclosure
10 that this was?

11 **A** It's a very shorthand way of putting out some information,
12 I would agree with that.

13 **Q** Were you aware shortly after the tweet that Tesla, the
14 company, started to get a lot of inquiries regarding the
15 meaning of "Funding secured"?

16 **A** I wasn't aware -- I mean, I don't recall just "Funding
17 secured" being part of the inquiries. There were a lot of
18 inquiries. I mean, there was a lot of press articles.

19 As I said, I was in Australia, so I actually saw the tweet
20 after it had already been out. So there was already quite a
21 lot of press articles around Tesla -- around Elon talking about
22 taking the company private. That was a very significant piece
23 of news.

24 **Q** Would you say that that piece of news was, in fact,
25 material?

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1 **A** Of course it was material. Yes. But as I said before,
2 the reason I was worried on the weekend before was that
3 selective disclosure in terms of one set of shareholders versus
4 all set of shareholders is actually the issue when you're
5 talking about material non-public information. And actually,
6 what the policy that you were referring to in the disclosure
7 document, policy document, actually tries to avoid. If you're
8 making a material statement to everybody, it's not selective
9 disclosure.

10 **Q** But if Mr. Musk was going to be making a material
11 statement to the market, such as if Mr. Musk was disclosing or
12 the company was disclosing its financial information for the
13 quarter, was that something that got reviewed as material
14 non-public information before it was -- before it became
15 public?

16 **A** The financials are reviewed. There is a process to review
17 them. But in this case, he's not talking on behalf of the
18 company. He's actually talking on behalf of himself,
19 announcing that he's considering taking the company private.

20 **Q** Okay. I --

21 **A** And so that the policy doesn't apply in that case. It's
22 black and white. If he was tweeting on behalf of the company,
23 then he would have had to apply the policy, the disclosure
24 policy. But because he was tweeting on behalf of himself, then
25 the policy doesn't apply.

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1 **Q** Okay. So you anticipated my next question.

2 **A** Sorry.

3 **Q** Which was going to be -- no, that's fine -- that no one
4 had the opportunity to review the tweet, but you are saying
5 that no one needed to review the tweet because Mr. Musk at that
6 point was not covered as bidder by the company's disclosure
7 policy? Is that correct?

8 **A** That's correct, that's correct.

9 **Q** So four days before, the board had convened with Mr. Musk
10 with Tesla's general counsel, and everyone was having these
11 discussions regarding initial conceptual conversations and how
12 Mr. Musk could best do that, with Tesla's general counsel
13 involved. Correct?

14 **A** Yes. We were trying to help Elon, as the bidder, to have
15 some conceptual discussions because it was material in terms of
16 the structuring of the transaction, and also in terms of the
17 quantity of funding that would have been needed.

18 So for example, if 30 percent of the shareholders wanted
19 to participate in a private vehicle, then he wouldn't have
20 needed 30 percent of the market cap at \$420 per share.

21 **Q** Understood.

22 **A** So that was why it was deemed that that was an appropriate
23 next step.

24 **Q** And at that time, this offer was material non-public
25 information for Tesla. Correct?

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1 **A** It -- it was, yes. But as I said, in any transaction,
2 there are two sides. One side was Tesla, our information -- if
3 we put out that information, we would have reviewed that
4 information along the way.

5 But there's also the other side, which is the bidder. And
6 in this case, it was Elon. And that information doesn't need
7 to go through -- as I said, if it was a third party, if it was
8 another CEO who was making a bid for Tesla to take it private,
9 then we would never have reviewed that information. And they
10 could have put it out whenever they wanted.

11 It's generally the case that you try and get to a place
12 where both parties know what's going to be communicated. But
13 it's not always the case.

14 **Q** So was there a certain point in time during that August
15 3rd meeting where the board said: Elon is now acting as bidder,
16 and our disclosure control policies no longer apply to him?

17 **A** He declared that he was bidder. I mean, he -- he actually
18 said it was his proposal. Even in that tweet, he said he -- he
19 is considering. "I'm considering."

20 **Q** So is there any board action that you can refer me to in
21 the August 3rd minutes whereby the board says: Mr. Musk is the
22 bidder, we're helping him with this selective disclosure issue,
23 we are involving Tesla general counsel, but he is now the
24 bidder and our disclosure policies no longer apply?

25 **MS. THOMPSON:** Objection, Your Honor. I don't know if

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1 counsel is trying to elicit privileged information, attorney
2 advice?

3 **THE COURT:** Overruled.

4 She's asking about in the minutes, is that disclosed
5 somewhere.

6 **THE WITNESS:** I don't recall that coming up in the
7 discussion at the board meeting.

8 **BY MS. TRIPODI**

9 **Q** But at some point in time prior to August 7th when he made
10 this tweet, the board made a decision that Mr. Musk was a
11 bidder, and the disclosure policies no longer applied to him?

12 **A** Well, the -- it's a fact that he was the bidder, and it's
13 a fact that the policies wouldn't apply in his role as bidder.

14 **Q** But the board made no formal decision regarding that.

15 **A** I don't think we needed to.

16 **Q** Okay. Now, the company -- after the tweets on
17 August 23rd, 2018, or thereabouts, there was a social media
18 policy that was enacted. Is that correct?

19 **A** I'm sorry, say that again? I didn't hear it properly.

20 **Q** Sure. On or around August 23rd of 2018, --

21 **A** Uh-huh.

22 **Q** -- there was a social media policy that was enacted. Is
23 that correct?

24 **A** There was, yes.

25 **Q** And if I can refer you to Exhibit 102.

DENHOLM - DIRECT / TRIPODI

1 **A** Uh-huh.

2 **MS. TRIPODI:** Your Honor, this has not yet been moved
3 into evidence so I would like to move to admit, please.

4 **THE COURT:** All right, any objection?

5 **MS. THOMPSON:** No objection.

6 **THE COURT:** Admitted. You may publish.

7 (Trial Exhibit 102 received in evidence.)

8 (Document displayed)

9 **MS. TRIPODI:** Thank you, Your Honor.

10 **BY MS. TRIPODI**

11 **Q** Ms. Denholm, do you recognize Exhibit 102 as being the
12 social media policy?

13 **A** Yes, I do.

14 **Q** And if we can look at the policy, am I correct that this
15 contemplates that social media posts that might contain
16 material non-public information are subject to prior review?
17 Is that correct?

18 **A** It does say that, yes.

19 **Q** And I know we're getting a bit in the weeds here. But if
20 we look under the "Additional information" section, the
21 document lists some subject matters that are likely to contain
22 material non-public information. And it lists in subset (b)
23 mergers, acquisitions, other significant transactions. Is that
24 correct?

25 **A** That is correct.

DENHOLM - DIRECT / TRIPODI

1 **Q** So is it your understanding that this policy would have
2 applied to Mr. Musk's tweets, had it been in place?

3 **A** No, it wouldn't have. So the disclosure policy that we
4 had at the time didn't specifically call out social media
5 because it was -- it was put in place in 2010, where social
6 media was relatively infrequently used by Elon, or by anybody
7 else, for that matter. And so it applied -- if he was tweeting
8 on behalf of Tesla, it would have applied in the format that it
9 was in.

10 As a board, we're constantly looking at the policies that
11 the company is -- is, you know, using, and the company's always
12 looking at their policies to make sure that if there are
13 improvements that they can make, that they do so. So this
14 social media policy was put in place because at that point in
15 time social media was more prevalent not just by Tesla and
16 Elon, but also by other CEOs and other companies.

17 And so it was a supplementary policy or an additional
18 policy that was put in place to explicitly call out social
19 media as subject to the disclosure controls that we had in
20 place as part of the original policy.

21 So, yes, so from my perspective, irrespective of whether
22 we had this policy or the other policy in place, the tweets
23 around August 7th were not subject to these policies because
24 they were in his personal capacity as bidder.

25 **Q** And your 2010 disclosure policy that was in place at the

DENHOLM - DIRECT / TRIPODI

1 time of the tweets, is it your testimony today that those did
2 not cover social media?

3 **A** No, they -- they did cover.

4 **Q** Okay.

5 **A** It wasn't -- the word "social media" wasn't in there but
6 if you look at the appendix to the policy, it actually covers
7 all other types of disclosures that are in the public domain on
8 behalf of Tesla.

9 **Q** Understood. Just some final questions, Ms. Denholm.

10 **A** Okay.

11 **Q** Prior to August of 2018, were you aware that some of
12 Mr. Musk's tweets had prompted negative reactions from
13 investors?

14 **A** His tweets about Tesla? Or other tweets?

15 **Q** Other tweets.

16 **A** Yes. I mean, in his personal capacity, he tweets about
17 many different topics. Many of which are not anything do with
18 Tesla. And there may be positive and negative views on those.

19 **Q** Understood. But did the board ever discuss Mr. Musk's
20 controversial tweets that may not have been Tesla-related?

21 **A** Occasionally, we have, yes. But again, they're not
22 contrary to the policies that we have in place around Tesla
23 business. But, like with any CEO, one of the things the board
24 does is -- is coach and mentor the CEO as well. And in this
25 case it's no different.

DENHOLM - DIRECT / TRIPODI

1 **Q** And was there a recognition on your part that Mr. Musk is
2 the CEO of a public company with tens of thousands of
3 shareholders, some of whom follow him on Twitter?

4 **A** Sorry. What was the question?

5 **Q** Do you understand as a board member that Mr. Musk is the
6 CEO of a public company, with tens of thousands of
7 shareholders, some of whom follow him on Twitter?

8 **A** Yes. I do recognize that.

9 **Q** And do you recognize that what Mr. Musk says on Twitter,
10 whether it's in his personal capacity as you're differentiating
11 here today or his capacity as Tesla CEO, can have a negative
12 impact on shareholders?

13 **A** It -- I think, most of our shareholders are very
14 accustomed to the different roles that he has. As I mentioned
15 before, he is the CEO of SpaceX, which is a very prominent
16 example. He tweets about SpaceX all the time. And so for me,
17 I think our shareholders are sophisticated enough to understand
18 the difference and the different roles that he has. If he's
19 talking about, you know, butterflies or something else, he's
20 not doing that in his capacity as -- as CEO of Tesla. He's
21 doing that in an individual capacity.

22 **Q** Understood.

23 **MS. TRIPODI:** I have no further questions right now.
24 If I can reserve some time?

25 **THE COURT:** All right, thank you.

DENHOLM - CROSS / THOMPSON

1 Cross?

2 **MS. THOMPSON:** Your Honor just for efficiency's sake,
3 I'd like to move a few exhibits into the record.

4 **THE COURT:** Okay.

5 **MS. THOMPSON:** It's Exhibit 96, 134, 135, 137, 139,
6 312, 313, 314, 315, 316, 317, and 318. And those are board
7 meeting minutes, special committee meeting minutes, and the
8 disclosure policy from 2010 that Ms. Denholm referenced.

9 **THE COURT:** All right. Any objection?

10 **MS. TRIPODI:** No objections, Your Honor.

11 **THE COURT:** All right, those are all admitted. Thank
12 you.

13 (Trial Exhibits 96, 134, 135, 137, 139, 312, 313, 314,
14 315, 316, 317, and 318 received in evidence.)

15 **MS. THOMPSON:** Thank you, Your Honor.

16 CROSS-EXAMINATION

17 **BY MS. THOMPSON**

18 **Q** Good afternoon. Where are you from?

19 **A** Originally from Australia. I'm also a U.S. citizen. I
20 lived in the U.S. for 17 years, and I have been coming
21 backwards and forwards for nearly 30 years.

22 **Q** And what do you do for a living?

23 **A** So today I'm an operating partner at a venture capital
24 firm in Australia called Blackbird, but I'm a finance and
25 operations professional. By background, I've been the CFO and

DENHOLM - CROSS / THOMPSON

1 COO of companies here in the U.S. as well as in Australia.

2 **Q** And have you served as a board member for companies in the
3 past, other than Tesla?

4 **A** Yes, I have. I was a board member of a public company in
5 the U.S. called Echelon Corporation, prior to becoming a board
6 member at Tesla. And I've always been on the board of a
7 U.S.-listed European company called ABB, a very large
8 125-year-old energy company that's sort of like the equivalent
9 of GE in the U.S. but for Europe.

10 **Q** And before you joined Tesla's board, had you ever met Elon
11 Musk?

12 **A** No. Only as part of the interview process of joining the
13 board, I met Elon as part of that process.

14 **Q** Okay. Now, you are what is referred to as an outside or
15 independent director at Tesla, right?

16 **A** Yes, I am.

17 **Q** Can you explain what that means?

18 **A** It means that I don't have any ongoing affiliation with
19 the company, other than my board role. I've never been an
20 officer of the company; I've never been part of the management
21 team of the company.

22 **Q** Apart from the action that the board takes as a whole,
23 what ability do you, as an individual, have to control any of
24 Tesla's executives?

25 **A** No ability. I mean, there's the policies and procedures,

DENHOLM - CROSS / THOMPSON

1 the code of conduct, all those sorts of things that govern how
2 the executives actually operate at the company.

3 **Q** Okay. So let's talk about, just briefly, that policy you
4 mentioned. It's Exhibit 318, if we could just publish it
5 briefly for the jury.

6 **MS. THOMPSON:** And this has been admitted. Can we
7 publish this, please, for the jury?

8 (Document displayed)

9 **BY MS. THOMPSON**

10 **Q** All right. Is this the policy that you were referencing
11 in the questions you received from plaintiff's counsel?

12 **A** Yes. It's the disclosure controls and procedures policy
13 that was in place.

14 **Q** And these are the policies that apply to Tesla when it
15 discloses certain information. Right?

16 **A** Yes.

17 **Q** Okay. And who is responsible for ensuring compliance with
18 these policies on a daily basis?

19 **A** The management team of Tesla.

20 **Q** Okay. And I think you mentioned this, but did this
21 disclosure policy have any applicability to Mr. Musk's tweets
22 that he was considering taking Tesla private at \$420 per share?

23 **A** No. I -- I don't believe so. In his role as bidder,
24 Tesla's policies are not relevant.

25 **Q** Okay. I'm going to turn you briefly to the August, 2018,

DENHOLM - CROSS / THOMPSON

1 timeframe. You were shown an email from Mr. Musk with an offer
2 to take Tesla private at \$420. Do you recall that?

3 **A** I do.

4 **Q** And when you received that email, what capacity did you
5 understand Mr. Musk was acting as?

6 **A** As a bidder for the company to take it private.

7 **Q** And you were asked about a board meeting that same day,
8 August 2nd. Do you recall that?

9 **A** I do recall that.

10 **Q** All right. And do you recall -- let me just speed this
11 along and if you want to look at the meeting minutes we can.

12 **A** Okay.

13 **Q** But do you recall Mr. Ahuja speaking at that board
14 meeting?

15 **A** Yes, I do.

16 **Q** And was there also a board meeting the following day,
17 August 3rd?

18 **A** Yes. In fact, we asked Elon to join a board meeting on
19 August 3rd after we had the August 2nd meeting, because we
20 wanted to ask him some questions about the proposed offer to
21 take Tesla private.

22 **Q** And between hearing from Mr. Ahuja on August 2nd and
23 Mr. Musk on August 3rd, what information did the board have
24 about the funding for the take-private transaction that
25 Mr. Musk was considering?

DENHOLM - CROSS / THOMPSON

1 **A** Yeah. So on the August 2nd meeting, Deepak Ahuja, who was
2 the CFO and Todd Maron were there, who is the GC. So Deepak
3 went through the sequence of events prior to us receiving the
4 letter which was that they had met with the Saudi PIF. Saudi
5 PIF had accumulated about a 4.9 percent position in the Tesla
6 company, buying shares. And at the meeting between Yasir,
7 Elon -- and Deepak was there -- they had offered the funding to
8 actually take Tesla private. And so that was part of that.

9 He also relayed to the board that there had been a
10 previous meeting in 2017 with SoftBank as well as the Saudi
11 PIF, and I believe Larry Ellison as well, that talked about the
12 same type of thing. That they would fund a transaction if Elon
13 wanted to take the company private.

14 **Q** Turning to the tweets that were published on August 7th --

15 **MS. THOMPSON:** Can we put up Exhibit 8, please, which
16 you were shown, Ms. Denholm.

17 (Document displayed)

18 **BY MS. THOMPSON**

19 **Q** This is "Am considering taking Tesla private at \$420.
20 Funding secured." You were asked some questions about sort of
21 materiality related to this. And I believe your answer was
22 that it was material that Mr. Musk was considering taking Tesla
23 private.

24 How did you view the significance of the second part of
25 the tweet, "Funding secured"?

DENHOLM - CROSS / THOMPSON

1 **A.** Quite honestly, I think the first part of the tweet was
2 the most important thing for anyone, for investors and for the
3 general public, because clearly taking Tesla private was a big
4 deal.

5 **Q.** Was there anything in Mr. Musk's tweets on August 7 that
6 was inconsistent with what you knew from hearing from
7 Mr. Ahuja, from Mr. Musk, and receiving Mr. Musk's email on
8 August 2nd?

9 **A.** No. It was entirely consistent. The funding was
10 available, at least the representations to us from both Deepak
11 and also Elon on the August 3rd. And I left the meetings fully
12 believing that if he wanted to take the company private, he
13 would be able to fund the transaction from multiple sources.

14 I had seen him raise funding for Tesla, both in terms of
15 the debt markets and also the equity markets, in the time that
16 I'd been audit committee chair, and they were always
17 oversubscribed. So I had no reason to believe that he wouldn't
18 be able to get the funding if he wanted to take the company
19 private.

20 **Q.** Now, after receiving --

21 **MS. THOMPSON:** We can take that down.

22 (Document removed from display.)

23 **BY MS. THOMPSON**

24 **Q.** After receiving Mr. Musk's email on August 2nd offering to
25 take the company private at \$420 per share, how seriously did

DENHOLM - CROSS / THOMPSON

1 the board take its role in considering that offer as the
2 counter party to Mr. Musk?

3 **A.** Very, very seriously. As you can see from the record, we
4 met many times and very frequently in terms of not only
5 understanding the offer, but also then forming a special
6 committee, getting advisors, both legal counsel as well as we
7 were in the process of getting financial advisors as well.

8 I take my -- my role as board member, but also as audit
9 committee chair, incredibly seriously.

10 **Q.** Now, Ms. Denholm, do you understand that you're here today
11 testifying because plaintiffs are trying to hold you personally
12 responsible for billions of dollars in damages they claim for
13 Mr. Musk's two tweets?

14 **A.** Yes, I do understand that.

15 **Q.** And, Ms. Denholm, during this time period in August 2018,
16 did you always act in good faith?

17 **A.** I absolutely did.

18 **Q.** And if you had thought Mr. Musk was trying to mislead
19 people with his tweets, what would you have done?

20 **MS. TRIPODI:** Objection, Your Honor.

21 **THE COURT:** Overruled.

22 **A.** I would have left the board. I have, as we talked about
23 before, many different things that I do in my life, and if I
24 believed that Elon was trying to mislead the public, I would
25 have stood down from the board.

1 Q. Thank you Mr. Denholm.

2 MS. THOMPSON: No further questions.

3 THE COURT: Thank you.

4 Redirect?

5 REDIRECT EXAMINATION

6 BY MS. TRIPODI

7 Q. Ms. Denholm, I'll be brief.

8 At the time that Mr. Musk tweeted that he had funding
9 secured at 420 on August 7th, had you seen a written agreement,
10 a written commitment, to fund the transaction?

11 A. No, I had not, but -- but it wouldn't be unusual in an
12 office that I just want to have a written agreement.

13 Q. And am I correct that at that point in time when he
14 tweeted "funding secured," that there was no structure that had
15 been decided upon for the deal?

16 A. Nothing decided. He -- Elon definitely outlined what he
17 wanted the structure to look like in that he wanted, you know,
18 the -- the vast majority of shareholders who had stuck with
19 Tesla over the years to actually be part of the go-private
20 transaction, and so he had outlined that.

21 But there wasn't a finalized structure at the time of him
22 putting out the tweet around considering taking Tesla private.

23 Q. Understood.

24 And your understanding with respect to the funding was
25 based on the meeting that Mr. Musk had had with the Saudi PIF;

DENHOLM - REDIRECT / TRIPODI

1 is that correct?

2 **A.** Not just that meeting, but it was Deepak's representation
3 to the -- to the board of that meeting, but also previous
4 meetings around potentially funding a go-private transaction
5 that had been contemplated or at least raised a year ago, and
6 then Elon going through different sources of potential funding
7 for the -- for a deal, yes.

8 **Q.** But at the time of the August 7th tweet, there had been no
9 determination as to whether regulatory approval from -- for a
10 large investment by the Saudi PIF, a sovereign wealth fund,
11 there had been no determination as to regulatory approval,
12 whether that would even be possible, was there?

13 **A.** It was one of the things that we discussed at the board
14 meeting, as to whether or not we would -- you know, he would
15 need to get regulatory approval, but there was no final
16 determination.

17 But having said that, there were also alternative sources
18 of funding that were available to him at that time.

19 **Q.** These funding sources were available, but not committed;
20 is that correct?

21 **A.** Well, they weren't documented yet, but he believed that
22 they were available, and we believed that they were available
23 having seen him raise funding for various things in the past.

24 **Q.** Understood. Thank you for your time.

25 **MS. TRIPODI:** No further questions.

DENHOLM - REDIRECT / TRIPODI

1 **THE WITNESS:** Thank you.

2 **MS. TRIPODI:** Thank you, Your Honor.

3 **THE COURT:** Anything on recross?

4 **MS. THOMPSON:** No questions, Your Honor.

5 **THE COURT:** All right. Thank you, Ms. Denholm. You
6 may step down. You're excused as a witness.

7 **THE WITNESS:** Thank you very much.

8 (Witness excused.)

9 **THE COURT:** All right. We've been going a long time,
10 but I do think we should take a short break even though that
11 only leaves 20 minutes with the next witness. We've been going
12 for over two hours.

13 **MR. SPIRO:** Yes, Your Honor. That's fine.

14 **THE COURT:** All right? So we'll take -- we can make
15 this a shorter break since we're going to be leaving in 30
16 minutes. Maybe a 10-minute break, if that's okay.

17 **THE CLERK:** All rise for the jury.

18 (Whereupon there was a recess in the proceedings
19 from 2:59 p.m. until 3:15 p.m.)

20 **THE COURT:** Welcome back, ladies and gentlemen. Have
21 a seat please.

22 Plaintiffs, are you prepared to call your next witness?

23 **MR. APTON:** Yes, Your Honor. Plaintiffs call Bradley
24 Buss.

25

BUSS - DIRECT / APTON

1 **BRADLEY BUSS,**

2 called as a witness for the Plaintiffs, having been duly sworn,
3 testified as follows:

4 **THE WITNESS:** I do.

5 **THE CLERK:** Thank you. Please have a set.

6 **THE WITNESS:** Thank you.

7 **THE CLERK:** You're welcome.

8 Please speak clearly into the microphone. State and spell
9 your first and last name for the record.

10 **THE WITNESS:** Bradley Buss. B-R-A-D-L-E-Y, last name
11 B-U-S-S.

12 **THE COURT:** All right. Thank you, Mr. Buss.

13 You may proceed.

14 **MR. APTON:** Your Honor, I have a witness binder and a
15 copy of a transcript to pass up, if I may.

16 **THE COURT:** Yep.

17 (Whereupon documents were tendered to the Court and the
18 witness)

19 **DIRECT EXAMINATION**

20 **BY MR. APTON**

21 **Q.** Good afternoon, Mr. Buss.

22 **A.** Hello.

23 **Q.** Hello.

24 You were a member of Tesla's board in 2018 when the tweets
25 in this case were sent; correct?

BUSS - DIRECT / APTON

1 **A.** Correct.

2 **Q.** Okay. And while you were a director, did you communicate
3 directly with Tesla's executive management?

4 **A.** I did.

5 **Q.** And that would include Deepak Ahuja?

6 **A.** Yes.

7 **Q.** Elon Musk?

8 **A.** Yes.

9 **Q.** Todd Maron?

10 **A.** Correct.

11 **Q.** Okay. I assume others as well?

12 **A.** Yes. Many different people.

13 **Q.** And you left the board in 2019; correct?

14 **A.** Correct.

15 **Q.** Do you have any current relationship with Tesla
16 professionally?

17 **A.** I do not. Not at all.

18 **Q.** And just curious, how come you didn't stand for renewal on
19 the board?

20 **A.** I had done ten years, which is a pretty long time, and our
21 terms were three years. And we were going to be adding people
22 to the board, and it was a perfect time to jump off and do some
23 other stuff.

24 **Q.** Okay. Now, Tesla -- prior to your joining the board,
25 Tesla had identified Elon's Twitter as a channel of corporate

BUSS - DIRECT / APTON

1 communication; correct?

2 **A.** Prior to me joining the board?

3 **Q.** When did you join the board?

4 **A.** I joined pre-IPO, so I'm not sure about the exact time.

5 **Q.** My mistake.

6 In 2013, Tesla identified --

7 **A.** That sound about right.

8 **Q.** -- Elon's Twitter channel as a corporate channel of
9 communications, yes?

10 **A.** Correct.

11 **Q.** And, now, several years after that, in 2018 when these
12 tweets at issue were made, was anyone on the board or anyone in
13 management reviewing Elon's tweets before he sent them?

14 **A.** Are you referring to specific tweets?

15 **Q.** His Twitter generally, yeah.

16 **A.** No, not specifically. I mean, we -- we had a disclosure
17 policy in place, and it would have fell under that as just
18 another form of communication.

19 **Q.** And can you briefly just describe that policy that was in
20 place at that time?

21 **A.** Yeah. Sure. You know, basically pre-IPO when you go
22 public, most companies will put in place a policy relating to
23 communicating externally. So this was a heavy focus on 10-Qs,
24 10-Ks, you know, 8-Ks, how you do them, who does them, how does
25 it work, stuff like that, so...

BUSS - DIRECT / APTON

1 **Q.** And from your perspective, given your role in the board
2 meetings, did you and the board all have a common understanding
3 of how that policy was to be enforced?

4 **A.** I would say so, yeah. It was -- I mean, it was fairly
5 straightforward and, you know, the management team was
6 well-verses. We had, you know, great legal advice and, you
7 know, we were always doing what we needed to get done.

8 **Q.** Legal advice from in-house counsel?

9 **A.** In-house, as well as the corporate attorneys that the
10 company used. You know, pretty standard process, you know, at
11 every quarterly reporting period.

12 **Q.** So if we can get to August 2nd of 2018. This is when Elon
13 sent that email to the board titled "Offer to Take Tesla
14 Private." Do you recall that?

15 **A.** I do.

16 **Q.** Now, when you received that email, did you regard it as a
17 formal offer or more of just a concept that he was expressing
18 concerning taking Tesla private?

19 **A.** I thought it was pretty interesting. I mean, it obviously
20 wasn't a detailed offer, but it was maybe more of an initial
21 offer concept of what he wanted to do.

22 **Q.** And, well, if we could show the witness Exhibit 81, which
23 is the email.

24 It should pop up on your screen there.

25 **A.** Should I use the screen or the binder?

BUSS - DIRECT / APTON

1 **Q.** It's up to you. Whichever one you feel more comfortable
2 with. The binder does have a copy of it.

3 **A.** There we go. Now it's up.

4 (Document displayed.)

5 **Q.** Okay. At the bottom of the email, it says (as read) :

6 Unless another bidder comes forward with a better
7 offer, I would ask that this matter be put to a
8 shareholder vote at the earliest opportunity."

9 Do you see that section?

10 **A.** I do.

11 **Q.** The terms laid out in this email offer, could they have
12 been put to a shareholder vote?

13 **A.** Not at that time, no.

14 **Q.** The subject line of the email says "Offer to Take Tesla
15 Private at \$420."

16 This email doesn't contain any explanation for that price,
17 does it?

18 **A.** Not in the email. We had a verbal discussion on that.

19 **Q.** And it also does not explain where the funding for the
20 transaction would be coming; is that correct?

21 **A.** Not in the email, but, again, we did subsequent to that.

22 **Q.** Sure. So on August 2nd you and your fellow board members
23 convene a meeting of the Board of Directors. Do you recall
24 that?

25 **A.** Yeah. We did, correct, that night.

BUSS - DIRECT / APTON

1 Q. Sure.

2 MR. APTON: If we could show Exhibit 82? These are in
3 evidence.

4 (Document displayed.)

5 BY MR. APTON

6 Q. These are the minutes of that meeting; is that correct?

7 A. Yes, sir.

8 Q. And based on my review of these minutes -- and I'm hoping
9 you can confirm for me -- at this time you and your fellow
10 directors needed more information about the structure for the
11 transaction; is that right?

12 A. Yeah. We were looking for more than what -- the update we
13 got primarily from Deepak and Todd.

14 Q. You guys wanted to know how the deal was going to be paid
15 for; is that right?

16 A. Uh-huh.

17 Q. That's a "yes," sir?

18 A. Oh, I'm sorry. Yes.

19 Q. Thank you.

20 And, importantly, who is going to be involved in terms of
21 who's going to pay for it; right?

22 A. Different elements, correct.

23 Q. Sure.

24 Now, the next day you have another meeting.

25 MR. APTON: If we could show Exhibit 83. These are

BUSS - DIRECT / APTON

1 also in evidence.

2 (Document displayed.)

3 **BY MR. APTON**

4 **Q.** Now, these are the minutes from that August 3rd board
5 meeting; correct?

6 **A.** Correct.

7 **Q.** And on the last page, Page 3, do you see that the board
8 authorized Elon to have, quote, conceptual conversations, close
9 quote? Do you see that?

10 **A.** Yes.

11 **Q.** So aside from having these conceptual conversations with
12 Tesla's top shareholders, did the board at this point authorize
13 Elon to make any other public statements about his offer?

14 **A.** No. We hadn't discussed any communication plan yet.

15 **Q.** And so everyone at this point knew that Elon's offer
16 needed to be kept confidential because it was material?

17 **A.** Yes.

18 **Q.** Big news; correct?

19 **A.** Yes. Internally, correct.

20 **Q.** Now, despite that, on August 7th, we have the tweet.

21 **MR. APTON:** If we could show Exhibit 8.

22 (Document displayed.)

23 **BY MR. APTON**

24 **Q.** I'm sure, sir, you're familiar with this tweet?

25 **A.** I might have seen that before.

BUSS - DIRECT / APTON

1 **Q.** I take it you're joking.

2 **A.** Yes. Sorry.

3 **Q.** Okay.

4 **A.** Yes.

5 **Q.** Thank you, sir.

6 And so, now, you understood "funding secured," the last
7 part of this tweet, to be a reference to the Saudi PIF; is that
8 right?

9 **A.** Them and others, correct.

10 **Q.** Well, sir, you were previously deposed in this case, yes?

11 **A.** Yes.

12 **Q.** And at the time of that deposition, you were asked a very
13 similar question.

14 And if I could just refer you to your deposition
15 testimony. You have a copy of your transcript in front of you.
16 Page 67, Line 23. It says (as read) :

17 **"QUESTION:**Did you have an understanding of
18 what Elon meant by 'funding secured' in
19 Exhibit A?

20 **"ANSWER:**At the point of the tweet
21 generically? Can you clarify?

22 **"QUESTION:**At the time. Sure. Sorry. At the
23 time of the tweet.

24 **"ANSWER:**Well, again, to our earlier
25 discussions on that, I think the background

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1 with the structure and the Saudi commitment,
2 I think it was 100 percent sure that, you
3 know, funding was not going to be an issue
4 due to the structure, due to investor
5 interest and, you know, having the Saudis as
6 the backstop on everything."

7 So this "funding secured" reference in Exhibit 8, it did,
8 in fact, refer to the Saudis, to your understanding; correct?

9 **A.** Yeah. As the main, correct, sure.

10 **Q.** Now, if we can go to Exhibit 13.

11 (Document displayed.)

12 **Q.** I believe you've also seen this tweet as well. Yes?

13 **A.** Hang on.

14 (Brief pause.)

15 **A.** Yes.

16 **Q.** And you recognize the sentence, quote (as read) :

17 "Only reason why this is not certain is that it's
18 contingent on a shareholder vote."

19 Do you recognize that -- that sentence, sir?

20 **A.** I've seen that, yes.

21 **Q.** Yeah. At this point in time, given what you and the board
22 had received, could a potential transaction have been presented
23 for a shareholder vote?

24 **A.** Not at that time, but it was obviously the main element.

25 **Q.** And so the shareholder vote referenced in this tweet, it

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1 was not the only reason why a going-private transaction was not
2 certain, was it?

3 **A.** It's the only one that mattered, but, yeah, there was
4 other things that still needed to get ironed out.

5 **Q.** Such as what?

6 **A.** I mean, the structure, the price, tremendous amount of
7 diligence. You know, just basic stuff.

8 But, you know, in the end, even if we agreed as a special
9 committee, it was still dependent on the shareholder,
10 shareholder side.

11 **Q.** Sure. But, nonetheless, you would agree that the
12 shareholder vote was not the only reason why this deal wasn't
13 certain at this point in time. Yes?

14 **A.** No, it was -- well, that's the main, the main one. It's
15 the only one that matters. Everything else doesn't matter if
16 the shareholders don't agree.

17 **Q.** Everything you just listed is irrelevant? It's not
18 important? You listed some important materials: Due
19 diligence, structure --

20 **A.** No, no. Meaning that it wouldn't -- it wouldn't matter if
21 the shareholders didn't agree with it, is all I was saying.

22 **Q.** And now -- well, it also wouldn't matter if there was no
23 funding because the whole thing would be moot anyway; correct?

24 **A.** That would be an element.

25 **Q.** Yeah. And so, sir, if I could just finish up here. If we

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1 can go to Exhibit 289.

2 Do you recognize this document, sir? It's a press
3 release -- well, do you recognize this document, sir?

4 **A.** I do.

5 **MR. APTON:** I'm not sure if this is in evidence. I'd
6 like to move it into evidence.

7 **MR. LIFRAK:** No objection.

8 **THE COURT:** Admitted.

9 (Trial Exhibit 289 received in evidence.)

10 (Document displayed.)

11 **BY MR. APTON:**

12 **Q.** This is the press release issued by the special committee
13 on August 14th, 2018. That would include yourself; correct?

14 **A.** Correct.

15 **Q.** And the press release states that, quote (as read) :

16 "The special committee has not received a formal
17 proposal from Mr. Musk regarding any going-private
18 transaction."

19 Is that correct?

20 **A.** That's correct.

21 **Q.** And as of August 14th, you're still waiting for a detailed
22 proposal?

23 **A.** Yeah, a final proposal for sure.

24 **Q.** Okay. Thank you, sir.

25 **MR. APTON:** I have no further questions.

THE COURT: All right. Thank you.

Cross?

MR. LIFRAK: Your Honor, I'm mindful of the jury's time. My examination I estimate 10 to 15 minutes at the most.

THE COURT: Okay. Well, let me ask. Does anybody need to leave right sharp at 3:30? Can you stay 10 more minutes? Does anybody have a problem with that?

(Jurors responding negatively.)

THE COURT: All right.

MR. LIFRAK: Thank you, Your Honor.

THE COURT: You have ten minutes past the 3:30 hour to
done.

CROSS-EXAMINATION

BY MR. LIFRAK

Q. Good afternoon, Mr. Buss.

A. Hello.

Q. Let's jump right in. August 2nd, 2018, the email from Mr. Musk regarding offer to take Tesla private. You said in your direct examination that you thought that was interesting.

A. Uh-huh.

Q. Did you think it was something that might make sense for the company at that point?

A. Yeah. I could see a lot of pros to it based on where the company was at and where they were looking to go long term.

8. And you mentioned a board meeting that was convened the

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1 same day, on August 2nd, in which Mr. Ahuja and Mr. Maron
2 spoke. Do you recall that?

3 **A.** I do.

4 **Q.** Did Mr. Ahuja say anything in that meeting about the PIF
5 owning any portion of Tesla stock at that point?

6 **A.** Yeah, he did. He brought that up, which, you know, I was
7 definitely unaware of, and I was like, "Wow." Because it's
8 pretty serious that they would do that ahead and, you know, I
9 looked at it as really a downpayment on what they were trying
10 to do.

11 So this was -- it was very real. I hadn't heard about it
12 prior, so...

13 **Q.** Now, did Mr. Ahuja at that meeting say anything about the
14 PIF's willingness to fund a go-private transaction?

15 **A.** Yeah, he did. He said they were being very aggressive.
16 They had called. I think they had a meeting at the end of
17 July. You know, the head guy was there. They wanted to do the
18 whole thing.

19 **Q.** Did Mr. Ahuja at this initial board meeting on August 2nd
20 say anything, even in general terms, about a possible structure
21 for the deal?

22 **A.** Very high level. There was discussions related to how
23 SpaceX, you know, was kind of configured.

24 **Q.** And what was that?

25 **A.** Private -- I mean, obviously a private company that had

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1 institutional smaller shareholders, different structures that
2 people, you know, were part of as a group.

3 And I think, you know, he was talking that it was, you
4 know, Elon's desire that everybody could -- if they wanted to,
5 could just kind of roll into a D listing slash privatization.
6 He wasn't trying to take over the company or control it or
7 anything like that.

8 **Q.** And then the next meeting was the next day, August 3rd,
9 with Mr. Musk doing most of the talking at that meeting; is
10 that right?

11 **A.** Yeah. We had asked him to join us once we had some more
12 background to understand his perspective better.

13 **Q.** And did Mr. Musk give any indication at that meeting as to
14 how he arrived at that \$420 a share price?

15 **A.** Yeah, he did. I mean, basically it was roughly a
16 20 percent increase from where the stock had been and that was
17 post. It was a decent run-up. We had a decent earnings and
18 the stock had ran up into the mid or low teens, I think.

19 So it was a real offer. I mean, you know, in my
20 perspective. I've done a lot of M&A stuff. 20 percent is "I'm
21 serious" and especially after a run-up. So I was like, "Hmm.
22 Wow."

23 **Q.** In this initial meeting, did he say anything about whether
24 he wanted a narrow base of investors in a potentially private
25 company or a broad base?

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1 **A.** No. He -- he wanted as broad as possible. Like I said,
2 in a perfect world, people could just flip from public to
3 private; but if people didn't want to do it, couldn't, didn't
4 understand it, there would be a vehicle to buy them out at the
5 offer price. That was kind of the rough concept at the time.

6 **Q.** And what did he say at this meeting about the PIF's
7 willingness to fund the transaction?

8 **A.** He was pretty adamant that they could do the whole thing;
9 and obviously depending on, you know, him rolling over the PIF,
10 already owning 5 percent, other large institutional guys
11 rolling, you know, the size of the check, you know, wasn't as
12 big as I think some of the headline numbers that people
13 expected.

14 **Q.** You received some questions in your direct examination
15 about whether you viewed Mr. Musk's "funding secured" statement
16 as referring to the PIF or to other potential investors as
17 well. Do you recall that?

18 **A.** Uh-huh. I do.

19 **Q.** And at this meeting on the -- the 3rd of August, did
20 Mr. Musk talk about other potential investors who could fund
21 any investors who didn't roll over in the company?

22 **A.** Yeah. Yeah, he did. We had a pretty extensive dialogue
23 on a handful of different companies.

24 **Q.** Do you recall any of those names sitting here today?

25 **A.** Yeah. I mean, obviously the PIF doing the whole thing,

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1 and then there was discussions related to the A -- AEU, you
2 know, potentially partnering with the PIF if need be.

3 And then some of our larger shareholders that were also
4 shareholders at SpaceX. So Fidelity, I think Baillie Gifford,
5 T. Rowe Price. I think Tencent was in there as well.

6 Q. And then you testified that you obviously saw the tweets
7 on August 7th; correct?

8 A. I did.

9 Q. And you saw the tweet that started with saying "Am
10 considering taking Tesla private at \$420." You saw that?

11 A. Yes.

12 Q. And did you believe when you saw that tweet on August 7th,
13 that that was different than what Mr. Ahuja and then later
14 Mr. Musk said at those meetings on August 2nd and 3rd?

15 A. No. Everything was consistent with what we had talked
16 about.

17 Q. And then the words "funding secured" were also in the same
18 tweet; is that correct?

19 A. Yes.

20 Q. And did you believe that part of the tweet was different
21 than what you understood from Mr. Ahuja and Mr. Musk at those
22 meetings in early August?

23 A. No. It was very consistent. I mean, there was a lot of
24 talk that he had related to, again, if a lot of people wanted
25 to roll, the number would be less than he thought. They'd be

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1 very oversubscribed. They would have to make decisions on who
2 to allocate the new investment to.

3 **Q.** And you stated in your direct examination that tweeting at
4 this point wasn't kind of the plan for communications going
5 forward; is that right?

6 **A.** That's -- yeah, we didn't have any communication plans
7 from the Tesla side and then him as the bidder.

8 **Q.** Did Mr. Musk at any point explain why he had tweeted at
9 the time -- at the point that he did?

10 **A.** Yeah. We had a subsequent board call to try to understand
11 that. And a lot of it, you know, was really due to there was a
12 rumor or article that was circulating early in the morning that
13 was talking about the potential PIF announcement, which, you
14 know, was obviously a major thing.

15 I think they're one of the top funds in the entire world,
16 so I think he was concerned on that and where that narrative
17 would go. And he made an in-the-field call to put that out so
18 that it wasn't just, you know, large investors, so to speak,
19 that maybe knew. He felt like it should go broad and deep.

20 **Q.** So let's take a step back just for a moment. At that
21 point in 2018, how long had you been on the Board?

22 **A.** Nine, nine-ish years.

23 **Q.** And your term on the Tesla board ended when?

24 **A.** June of '19.

25 **Q.** Was being on the Tesla board during this period your

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1 full-time job or were you doing other things?

2 **A.** In '18? No. I was retired from operating role, so I was
3 doing a couple of board services and just some private
4 investing.

5 **Q.** What about during the period before that?

6 **A.** When I first joined the board, I was the CFO at a company
7 called Cypress Semiconductor.

8 **Q.** All right. During the period that you were on the Tesla
9 board, did you have any kind of a personal or social
10 relationship with Mr. Musk at all?

11 **A.** No. I didn't know him or any of the board members before
12 I joined.

13 **Q.** What about at this point?

14 **A.** No, no.

15 **Q.** Okay. So going back to the summer of 2018, after
16 Mr. Musk's email to the board and the meetings that we talked
17 about on the 2nd and the 3rd, was there a special committee of
18 the board formed?

19 **A.** There was.

20 **Q.** And could you explain what a special committee is?

21 **A.** In one minute? Sure. Basically --

22 **Q.** We have 1 minute and 15 seconds.

23 **A.** -- it was a delegation from the board literally to make
24 the decision on this transaction. So it was -- there was a lot
25 of power in the committee. If we didn't agree to do it, it

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1 would be dead and wouldn't move on.

2 So there was a lot of fiduciary duties that we had, and we
3 took them very seriously. We met very frequently. More
4 lawyers than I care to talk about. And, you know, we were
5 going at it literally every day.

6 Q. During what period? So beginning of August until the --
7 it was decided not to go forward with the transaction; is that
8 right?

9 A. Yeah. I think August 24th or '5th; correct.

10 Q. And did Mr. Musk attend these meetings of the board
11 special committee?

12 A. No, no. Not at all.

13 Q. Why is that?

14 A. I mean, because he's the bidder. You know, we were acting
15 on behalf of the company and the shareholders, so there's --
16 there's a pretty big wall that goes up. Literally it happened
17 as soon as he sent that email, because he obviously became a
18 bidder and he wasn't -- you know, we excused him from any kind
19 of board things that we didn't need him and the committee
20 really took over from there.

21 Q. And I know we're only talking about a matter of weeks, but
22 what did the special committee do or accomplish during the
23 period that we're talking about?

24 A. So we obviously hired external counsel, and then it was a
25 tremendous amount of time related to the process of how to run

1 this. And then that counsel was working with Elon and his
2 advisors on a host of things, you know, to move the ball
3 forward.

4 And then we had started to look at which financial
5 advisors that would have been very crucial in this to hire. So
6 we had started an exercise on scoping out who to hire, and we
7 were going to start interviews right before it was called off.

8 **Q.** And you mentioned that it was called off approximately
9 August 23rd of 2018. Do you recall that?

10 **A.** Yes.

11 **Q.** And in your mind, what was the reason that the transaction
12 didn't go forward?

13 **A.** Well, I mean, most of it, I think, it was a pretty crazy
14 time for Tesla. I think, as people, you know, may not
15 remember, but it was very pivotal in getting that Model 3 out.
16 This was becoming very complicated.

17 And I think a lot of shareholder pushback that he had,
18 especially from some of the smaller retail guys that he was
19 extremely, you know, friendly with, he just decided not to do
20 it. And obviously as a committee, if he wasn't interested,
21 there was no need for the committee. So we disbanded that as
22 well.

23 **Q.** And, finally, Mr. Buss, did your experience with this
24 potential go-private transaction change your view in any way of
25 Mr. Musk as a leader of the company?

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1 **A.** No, not at all. I mean, I think he was looking at doing
2 the right thing. And in the end, he made a decision that the
3 shareholders obviously have benefited from extremely well over
4 the last few years.

5 **Q.** All right. Thank you.

6 **MR. LIFRAK:** Thank you, Your Honor.

7 **THE COURT:** All right. Thank you.

8 Sounds like a couple questions on redirect.

9 REDIRECT EXAMINATION

10 **BY MR. APTON**

11 **Q.** Mr. Buss, during the August 3rd meeting with -- sorry.

12 Mr. Buss, during the August 3rd meeting with Mr. Musk when
13 he listed off a number of other shareholders who could
14 potentially invest in the deal, aside from the Saudis, he
15 hadn't spoken to any of those other shareholders, correct?

16 **A.** He hadn't?

17 **Q.** Right.

18 **A.** I don't believe he had talked to them in detail, no.

19 **Q.** And you referenced that Mr. Musk's tweet on August 7th,
20 the "funding secured" tweet, that was I think you referred to
21 it as an "in-the-field call;" right?

22 **A.** Oh, that he made. Yeah, he made a call upon hearing the
23 news about the PIF.

24 **Q.** Given your experience on corporate boards and such, is
25 that the proper approach to corporate disclosures from a CEO of

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1 a public company, in your opinion?

2 **A.** Well, again, he was acting as the bidder. So in my mind,
3 I can't control him like I could control a third party. If he
4 was acting for the company, yeah, it would be a different
5 animal.

6 **Q.** Thank you, sir.

7 **MR. APTON:** Thank you.

8 **THE COURT:** Anything further?

9 **MR. LIFRAK:** No, Your Honor. Thank you.

10 **THE COURT:** All right. Thank you, Mr. Buss.

11 **THE WITNESS:** Thank you.

12 **THE COURT:** Appreciate you being here. You are
13 excused as a witness. You may step down.

14 (Witness excused.)

15 **THE COURT:** And that will bring us to the end of
16 today. Thank you again, ladies and gentlemen of the jury, for
17 your patience and indulgence staying with us.

18 Have a great weekend. We will see you on Monday morning.

19 **JUROR CADOGAN:** Tuesday?

20 **THE COURT:** You're right. Tuesday morning. I
21 promised you that. I'm just testing your memory.

22 You're right, Tuesday. Give us a chance to recover from
23 the 49'er victory that won't happen.

24 (Laughter)

25 **THE COURT:** So we'll see you Tuesday morning at 8:30.

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1 Have a great weekend.

2 And remember, do not discuss this case with anyone. Do
3 not attempt to do any research on your own. Don't read, don't
4 listen, don't talk to anybody about any coverage or anything
5 about this case. Keep an open mind until this case -- and keep
6 your opinions open until you start the deliberations.

7 So we'll see you next week. Thank you.

8 **THE CLERK:** All rise for the jury.

9 (Jury exits the courtroom at 3:42 p.m.)

10 **THE COURT:** I just want to cover a couple things.

11 We'll have to get the latest -- I noticed there's a little
12 discrepancy between your time calculations and ours. And
13 Vicky's going to look at that, but she is the official
14 timekeeper. So we'll see.

15 But the clock is running. My sense is that, you know,
16 there's probably less than eight hours left total? I mean, for
17 everyone.

18 **MR. PORRITT:** I'm not sure if that's quite right, but
19 I don't have the figures in front of me.

20 **MR. SPIRO:** Yeah. It sounds like whatever Vicky says,
21 so...

22 **THE COURT:** All right. I know I have to resolve this
23 question about the expert and the options question. I don't
24 want to argue the full thing now, but I have -- I do have one
25 question that would help me, and that is: What are the

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1 parties' position with respect to whether using actual
2 prices -- if one were to use actual prices as was done, is
3 there a methodology -- staying within that realm, not having to
4 use imputed prices, is there a methodology to account for the
5 micro -- what we call the microeconomic problem, buying at 30 a
6 share and somebody else buying at 40 a share? How do you...

7 I understand there's a legal answer to that. One legal
8 answer is that you take it as it is.

9 I'm just curious whether or not either side has a view
10 about whether or not if one goes down that road and one wanted
11 to somehow take that into account, is there a methodology to
12 deal with that?

13 **MR. PORRITT:** I don't know the answer to that
14 question.

15 Professor Steve Heston is in the back. He might have an
16 answer, but I'm not proposing he come up and give it. So I
17 don't know the answer. I don't know.

18 **THE COURT:** All right. Let me ask the Defense
19 position.

20 **MR. ROSSMAN:** Your Honor, I think there may well be.
21 And one of the issues for us is that it goes to, among other
22 things, the question of whether this is an appropriate class,
23 the options class.

24 It's quite an unusual class in that you have buyers and
25 sellers. You have puts and calls.

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1 And, you know, one of our serious concerns here is that if
2 you don't get it right, you're going to brand some people
3 winners that were actually losers and vice-versa. And it's a
4 big issue in options because of, among other things, a very
5 large bid-offer spread.

6 **THE COURT:** Putting aside the --

7 **MR. ROSSMAN:** But I think -- I think -- I think the
8 answer is it could have been done potentially.

9 If the answer to that is yes, then that's a problem. We
10 should be able to cross on that. If the answer to that is no,
11 it's also a problem because perhaps the methodology doesn't
12 work at all.

13 **THE COURT:** I'm sorry. If the answer is no, what?

14 **MR. ROSSMAN:** If the answer is no, it couldn't be
15 done, then maybe the answer is the methodology doesn't work as
16 a one-size-fits-all for the class to measure damages. You have
17 to look at each individual.

18 **THE COURT:** Well, or the answer also is if there is no
19 way and you had advocated a -- advocated against using an
20 imputed method obviously in favor of actual method and yet now
21 you're saying that method is inherently flawed, to which there
22 is no fix, no answer, no methodology, that's why I asked the
23 question. It seems to me that's problematic.

24 I think that raises the question of estoppel more
25 emphatically if -- if there is no -- it's one thing to say,

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1 " Yeah, it's okay to use actual numbers, but you should have
2 done X, Y, and Z. You should have done process X to that."

3 **MR. ROSSMAN:** On that question, Your Honor, I'm more
4 than a bit puzzled because it's their obligation to come
5 forward with a damages methodology that stands up, not ours.
6 And if they can't come up with one or one can't be had, that's
7 a -- that's a flaw.

8 **THE COURT:** Well, if you recall the argument,
9 wasn't -- I don't think we reached the question whether the
10 methodology that they chose using the imputed method or
11 attribution method was inherently unreliable.

12 This ended up being a negotiated settlement because I
13 raised questions and asked why are we using -- in part, because
14 of your responsive brief, why are we going into the realm of
15 hypotheticals, et cetera, et cetera? And that's when they
16 acceded to, "Well, if you want, we'll use real numbers." And I
17 didn't hear any objection from you about that.

18 **MR. ROSSMAN:** But -- that's right, Your Honor, but
19 that's -- that's half of the equation. So -- and let me
20 finish. It's important. Okay?

21 You have to start with actuals. Okay? That's where
22 people actually traded. We are in agreement on that. We're
23 not going to challenge that.

24 **THE COURT:** I don't know about that.

25 **MR. ROSSMAN:** Well, Your Honor --

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1 **THE COURT:** If you're saying that using actual numbers
2 is inherently flawed, to which there is no fix, and maybe the
3 next best thing is using some imputed method to account for
4 this phenomenon that you've raised, it's not clear to me that
5 that can't be done.

6 **MR. ROSSMAN:** Yeah. I'll respond to that, but if I
7 can finish what I was saying a moment ago, Your Honor, because
8 it's important.

9 You start with actuals. And then what they compare them
10 to has to be a fair comparison, has to be apples to apples.
11 And if it's not, perhaps it's salvageable if you can make
12 adjustments so that it is a fair comparison.

13 Our -- our complaint and our -- you know, part of what
14 we're going to be examining the witness on, about on this is if
15 you start with actuals and you're comparing it to something
16 that differs in an important way from the actuals, then you
17 have to make an adjustment for that. The offer is an example
18 of it. There are others.

19 If you haven't made an adjustment, then you should admit
20 you haven't made that adjustment and the measure of damages is
21 flawed for that reason.

22 That's, I think, a very fair line of criticism.

23 **THE COURT:** Well, this is deja vu all over. We've had
24 this discussion. There is an inherent disconnect because the
25 but-for price is inherently hypothetical. So you can't. There

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1 is an inherent apples and oranges aspect of this and that can't
2 be the end of the inquiry.

3 **MR. ROSSMAN:** I mean, Your Honor, I'm a little -- I
4 don't want to delve too --

5 **THE COURT:** Can you answer my question?

6 **MR. ROSSMAN:** I was going --

7 **THE COURT:** I told you I didn't want to argue this.
8 All right? And now you're rearguing, and I asked you not to
9 argue it.

10 I'm asking you a very specific question. Do you have any
11 knowledge of whether taking actual numbers, there is a
12 methodology to account for this, what you claim to be a
13 defective phenomenon?

14 It's not clear to me it's defective because one could say:
15 You take your buyer and your seller as you find them. You
16 know, if somebody pays 40 bucks, that's your problem. You're
17 the guilty one, if the jury so finds.

18 But I'm not going to go there right now. I'm asking you a
19 specific question. If you can't answer, just tell me you can't
20 answer it.

21 **MR. ROSSMAN:** No, Your Honor. I don't think -- what I
22 was going to say is we have the expert in the courtroom. If
23 you want to dive deeply, which I'm happy to, okay, I don't know
24 if it's appropriate to have the expert in the courtroom.

25 But to answer your question, Your Honor, I believe there

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1 are ways that Professor Heston could have taken to try to make
2 it work.

3 **THE COURT:** All right. Then I will say that that
4 would be a proper basis of cross-examination and impeachment,
5 but a general approach that you cannot -- there's no inherent
6 way of using actual numbers. That would be a problem.

7 **MR. ROSSMAN:** And to be very clear, Your Honor, we're
8 not -- we are not saying -- we haven't said it and we're not
9 going to be saying that using actual numbers was the error.
10 Okay?

11 What we are going to be saying is two things, and I
12 thought we -- we were pretty transparent about this. Okay? We
13 tried to be as much as we could, and you said we could cross on
14 this. Okay? That using actual numbers to how you did the
15 but-for has a disconnect, and we should be able to explore that
16 disconnect.

17 If I'm wrong about it, Professor Heston will tell me I'm
18 wrong about it. Okay? If I'm right about it, then it will be
19 persuasive.

20 **THE COURT:** Right. So to be clear, I'm going to allow
21 cross-examination on the methodology and on problems that
22 essentially the defendants say could have been done but weren't
23 done here, but I'm not going to allow a general approach or
24 cross that just simply says -- that suggests that you can never
25 rely on actual numbers when you're comparing that to a but-for.

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1 And I understand that's not going to be their theory and,
2 therefore, your request -- I'm not sure what your request is,
3 but I'm going to -- you know, if that's not where they're going
4 to go, then it seems to me what is being proffered is proper
5 basis for cross-examination.

6 **MR. PORRITT:** And just two things, Your Honor,
7 quickly.

8 One is, they propose -- they suggest that there were three
9 methods proposed by plaintiffs' experts when, in fact, there
10 were only ever two, and one was a -- proposed by a counsel that
11 wasn't accepted. And so that's -- that was a counsel -- it had
12 nothing to do with the expert. They testified to that in
13 depositions, but clearly they had no responsibility on before
14 that and he's not endorsed it in any way, shape, or form.

15 So we would certainly object to them presenting that at
16 trial when the jury is going to go three versus two. So that's
17 point one.

18 Second point is, we would have an issue with
19 cross-examination if there's any suggestion that the change
20 from impact quantum to actual prices was in any way a
21 concession that the impact quantum was wrong or they should
22 have used actual all along or that the use of -- the initial
23 proposal of impact quantum suggests the use of actual prices is
24 wrong, when really that has been the result of the
25 give-and-take that Your Honor has described. I think that

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1 would be an improper method of cross-examination.

2 **THE COURT:** You raised the question of whether there
3 should be inquiries into the first opinion, because if so,
4 then -- it then has to be explained exactly what happened and
5 why it happened, and I'm not sure that that's -- there could be
6 a 403 problem here.

7 Why not just take his testimony as it is and -- and if
8 there's going to be -- certainly that's going to be grounds of
9 impeachment. What you should have done is the way he had
10 proposed. I'm sure that's not going to be the cross. I'm
11 sure -- I assume it's going to be a critique of what was done
12 within the realm of using actual numbers.

13 **MR. ROSSMAN:** Can I respond, Your Honor?

14 **THE COURT:** Yes.

15 **MR. ROSSMAN:** So what we have is that they claim it's
16 not a methodology. Their latest brief admits it, it's is a
17 change in methodology.

18 But there have been three, so that we're clear. Impact
19 quantum. In the middle they proposed a verdict form where they
20 said: Ignore changes in implied volatility. We'll just
21 recalculate option prices relying on one thing only, changes in
22 stock price."

23 They didn't show that to their experts apparently. Okay?
24 But they filed it with the Court. They're prepared to go on
25 that issue. We objected again. We said: Wait a second.

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1 Implied volatility changed in the interim. You've got to get
2 the calculation right.

3 They came back and now they have a third. And the third
4 one is it starts with actual, which is the right starting
5 place. We're not quarreling with that. Okay? And then what
6 they use is they use a but-for simplifying a calculation that I
7 will want to explore with the Professor, why the simplification
8 has problems with it. And I think Your Honor appreciates now
9 why that's fair. Okay?

10 But I also think it's fair, and in every case I've -- I've
11 crossed 100 experts at trial, I've seen hundreds more. Your
12 Honor has seen thousands, okay, of experts testify at trial, I
13 have no doubt. It is commonplace to cross-examine an expert
14 with an opinion that they've previously given.

15 It's commonplace to cross-examine an expert where a Court
16 has previously rejected their opinion. Okay? We've seen that
17 here in this courtroom when it came to Professor Subramanian.

18 So what I think is fair game here, and we very much would
19 like to and expect to be able to cross the witness on, is you
20 had this methodology and now you have a new methodology and the
21 numbers are different.

22 And I also think it's fair game to say: If you had
23 calculated your numbers based on the verdict form that
24 plaintiffs' counsel submitted in the interim, you'd get yet a
25 third set of numbers. And the numbers vary tremendously and

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1 meaningfully, Your Honor. And I think that that's important to
2 the credibility of the damage assessment.

3 **MR. PORRITT:** It's not important to the credibility of
4 the expert witness to present a methodology that they didn't
5 endorse, didn't see. That was an attempt to reach a
6 compromise -- mistakenly, it appears that there was no
7 compromise there -- to try and remove actually this implied
8 volatility issue from the jury.

9 **THE COURT:** And that's the problem. I don't believe I
10 made a clear *Daubert* decision. It's one thing for a situation
11 where a Court has outright rejected a theory. We didn't reach
12 this here. So this is almost a sort of voluntary withdrawal to
13 avoid that risk and to find something that was going to be --
14 what you thought was going to be acceptable and less
15 controversial.

16 So it's not just an expert. This has an interplay with
17 Court comments, counsel attempt to accommodate, et cetera,
18 et cetera. That's where it gets a little bit more complicated.

19 We're going to pick this up because I'm behind. So we'll
20 take this up.

21 **MR. PORRITT:** I understand, Your Honor.

22 **MR. SPIRO:** Very good.

23 **MR. PORRITT:** Thank you, Your Honor.

24 **THE CLERK:** Court is adjourned.

25 (Proceedings concluded)

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Saturday, January 28, 2023
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